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WHO IS GOING TO PAY THE BILLS: AN EXAMINATION OF THE FINANCING AND LEASE OPTIONS AVAILABLE TO THE BUFFALO BILLS AND RALPH WILSON STADIUM

I. INTRODUCTION

The Buffalo Bills have a remarkable and, at the very least, memorable football history filled with many successes and dramatic shortcomings.¹ In the eyes of many, the Bills are known for coming up short, notoriously exemplified by four consecutive Super Bowl losses in the early 1990s.² This string of bad luck followed the Bills into the new millennium, leaving the team with the longest playoff drought in the National Football League (NFL) entering the 2012 football season.³ Recently, however, the Bills' troubles have extended off the field in the form of lease negotiations with Erie County regarding their home venue, Ralph Wilson Stadium.⁴

Since 1973, Erie County, the municipal owner of Ralph Wilson Stadium, has leased the stadium to the Erie County Stadium Corporation, an entity formed to represent New York State, which in turn leased the stadium to the Buffalo Bills.⁵ This lease agreement was set to expire on July 31, 2013, but on September 12, 2012, the par-

1. See Mike Lopresti, *Buffalo Bills Fondly Recall Four Consecutive Super Bowl Losses*, USA TODAY (Jan. 30, 2011, 8:44 PM), http://www.usatoday.com/sports/columnist/lopresti/2011-01-30-lopresti-buffalo-bills-super-bowl_N.htm (describing how Buffalo Bills repeatedly made Super Bowl appearances "even as the nation turned them into a punch line for futility"); see also Bob Siuda, *20 Years Later, Wide Right Continues to Haunt Buffalo Bills Fans*, SYRACUSE.COM (Jan. 28, 2011, 10:34 AM), http://blog.syracuse.com/sports/2011/01/20_years_later_wide_right_cont.html (recalling Super Bowl XXV where Buffalo Bills kicker Scott Norwood missed game-winning field goal by kicking it just outside right field goal post).

2. See Lopresti, *supra* note 1 (remembering four straight Buffalo Bills Super Bowl losses in early 1990s).

3. See Paul Howard, *The Blundering Bills: Longest Playoff Drought in the League*, FOOTBALL NATION (Jan. 30, 2012), <http://www.footballnation.com/content/the-blundering-bills-longest-playoff-drought-the-league/13247/> (noting "[i]t has been a dozen years since the Buffalo Bills have reached any kind of success in entering the Playoffs. This is the longest lapse of time in the league.").

4. See Jim Heaney, *Taxing Questions Regarding The Bills*, ARTVOICE (Apr. 19, 2012), http://artvoice.com/issues/v11n16/special_report/ (stating that Bills' "lease on Ralph Wilson Stadium expires in July 2013" and identifying issues that need to be resolved).

5. See *Buffalo Bills Draft Lease Agreements*, ERIE.GOV, <http://www.erie.gov/bills/lease/> (last visited Sept. 8, 2012) (containing Master Lease between Erie County and Erie County Stadium Corporation and Stadium Lease between Erie County Stadium Corporation and Buffalo Bills).

ties agreed to extend the current lease agreement for one year if a new lease agreement was not in place by July 31, 2013, effectively granting Erie County and the Bills an extra year to negotiate a suitable long-term agreement.⁶

Two fundamental obstacles prevented the parties from reaching a new lease agreement in the fall of 2012.⁷ First, the Bills sought a financial commitment from Erie County to make renovations to Ralph Wilson Stadium.⁸ The Bills believed the taxpayers of Erie County and New York State should provide a substantial portion of the funding for such renovations through public financing.⁹ In response, Erie County sought to protect itself against the possibility that the Bills franchise will relocate soon after the two sides enter into a new lease agreement, effectively leaving the Buffalo community without an NFL franchise and leaving the taxpayers of Erie County and New York State with the burden of paying for a newly renovated stadium.¹⁰ Therefore, it can be shown that the parties faced two distinct yet intertwined issues in reaching a new lease agreement: (1) how to fund the renovations to Ralph Wilson Stadium and how to allocate the renovation cost between public funding (i.e. government subsidies, tax increases, etc.) and private funding (i.e. the Bills franchise, the NFL, etc.), and (2) what guarantees should be in place to discourage the Bills franchise from

6. See *id.* (indicating in recitals of Stadium Lease that lease expires on July 31, 2013); see also *Bills, County Agree to 1-year Lease Extension*, SI.COM (Sept. 12, 2012, 11:35 AM), <http://sportsillustrated.cnn.com/2012/football/nfl/09/12/bills-lease.ap/index.html> (revealing “[s]talled lease negotiations have led to the Buffalo Bills and Erie County favoring a one-year lease extension that would allow the team to keep playing at Ralph Wilson Stadium next season while talks continue on a long-term deal”).

7. See *infra* notes 8-10 and accompanying text (presenting positions of parties and two central issues that must be addressed before new lease agreement can be reached).

8. See Denise Jewell Gee & Gene Warner, *Next Lease for ‘The Ralph’ Likely to Be the Last*, THE BUFFALO NEWS, Oct. 8, 2012, at D1, available at <http://buffalonews.com/apps/pbcs.dll/article?AID=/20121007/CITYANDREGION/121009335> (reporting that Bills, represented by owner Ralph Wilson, Jr., “want the state and the county to put some substantial money into fixing [Ralph Wilson Stadium] up It’s crumbling right now. But we don’t want a Taj Mahal. We just want a nice, clean place to watch a football game.”).

9. See *id.* (explaining why New York State and Erie County should provide substantial amount of money for renovations).

10. See Denise Jewell Gee, *Bills’ Buyout Fee Could Pass \$50 million*, THE BUFFALO NEWS, Sept. 22, 2012, at A2, available at <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20120923/CITYANDREGION/120929601/1010> (reporting that taxpayers need to be protected if Bills franchise were to relocate; observers of Bills lease negotiations expect figures of \$50 to \$100 million as liquidated damages to deter franchise relocation).

relocating and how can the taxpayers' investment in the stadium renovation be protected.¹¹

Fortunately for the Bills, there have been several recent stadium construction and renovation projects from which the contracting parties could learn, including the construction of MetLife Stadium in East Rutherford, New Jersey; Cowboys Stadium in Arlington, Texas; Lucas Oil Stadium in Indianapolis, Indiana; the renovation of Arrowhead Stadium in Kansas City, Missouri; and the future construction of the Forty-Niners' new stadium in Santa Clara, California.¹² Additionally, several professional sports teams have faced similar dilemmas to the Bills' in structuring lease agreements, especially pertaining to the public and private financing of stadium construction and renovation.¹³ From 1990 to 2000, seventy-seven major league teams in professional football, baseball, basketball, and hockey experienced stadium lease re-negotiations, stadium renovations, or stadium construction at a cost of approximately \$12 billion.¹⁴

While other professional sports franchises have successfully undergone stadium renovations, the situation in Buffalo extends beyond mere financing concerns.¹⁵ Underlying the development of a new lease agreement is a concern over the health of an aging owner, Ralph Wilson, Jr., who intends to own the Bills until he passes away.¹⁶ Upon Mr. Wilson's death, the team will be placed in a trust and sold by Mr. Wilson's family.¹⁷ The uncertainty as to

11. For a further discussion of parties' interests and positions in creating new lease agreement, see *supra* notes 8-10 and accompanying text.

12. For a further discussion of the sources of funding used to finance the construction of MetLife Stadium, Cowboys Stadium, Lucas Oil Stadium, the renovation of Arrowhead Stadium, and the future construction of the Forty-Niners new stadium in Santa Clara, California, see *infra* notes 143-163 and accompanying text.

13. See Martin J. Greenberg, *Stadium Financing and Franchise Relocation Act of 1999*, 10 MARQ. SPORTS L.J. 383, 384-87 (2000) (introducing and exploring public and private sources used to finance sports stadiums and how teams and municipalities have historically allocated costs of building new stadiums between such public and private sources).

14. See *id.* at 383 (revealing "[s]ince 1990, there have been seventy-seven major league facility lease re-negotiations, modernizations, or newly constructed projects in professional football, baseball, basketball and hockey at an approximate cost of \$12 billion").

15. For a further discussion of how the Bills situation is complicated by uncertain ownership, see *infra* notes 17-18 and accompanying text.

16. For a further discussion of the concerns over the health of Ralph Wilson, Jr., see *infra* notes 43-50 and accompanying text.

17. See Tim Graham, *Goodell Wants Bills in WNY But No Guarantees*, THE BUFFALO NEWS (Aug. 8, 2012, 11:14 AM), <http://blogs.buffalonews.com/press-coverage/2012/08/goodell-wants-bills-in-wny-but-no-guarantees.html> (reporting NFL Commissioner Roger Goodell stated, "Mr. Wilson has made it very clear that he is

when and to whom the franchise will be sold amplified the concern over the Bills' future in western New York because it raises the possibility that a wealthy group of investors may swoop in after Mr. Wilson's death, purchase the franchise, and subsequently relocate the Bills.¹⁸

With seemingly incredible clairvoyance, a sports and entertainment law practitioner described some of the problems associated with developing lease agreements for professional sports franchises, such as the Buffalo Bills:

Driven by pressure to increase revenues, teams may threaten public landlords with relocation if demands for renovated or replacement facilities are not met. In many circumstances, those threats are bolstered by offers from competing jurisdictions intent on luring franchises away from their current homes. Proposals to allocate public funding to professional sports facilities often spark heated debates While decisions to commit public funding to the renovation or development of a sports stadium or arena will rest with civic and business leaders¹⁹

The issues presented by the public financing of stadiums combined with the pressures and costs associated with relocation threats have led to a debate over the merits of supporting a new or renovated stadium within a hosting municipality.²⁰ With proper planning and oversight, many believe that renovated or new stadium

not going to sell the franchise while he's alive, and once he passes on the franchise will be sold."); see also Albert Breer, *NFL in L.A.? Five Teams Could Move, But Nothing's Imminent*, NFL.COM (May 11, 2012, 1:09 PM), <http://www.nfl.com/news/story/09000d5d82905f97/article/nfl-in-la-five-teams-could-move-but-nothings-imminent> (reporting that "[t]he club's succession plan is to put the team in a trust and sell to the highest bidder").

18. See Mike Florio, *Bills Fans Should be Nervous About Losing Their Team to L.A.*, NBC SPORTS (June 19, 2012, 12:29 PM), <http://profootballtalk.nbcsports.com/2011/06/19/bills-fans-should-be-nervous-about-losing-their-team-to-l-a/> (quoting Jerry Sullivan, writer for *The Buffalo News*, who wrote, "When [92-year-old owner Ralph] Wilson is gone, all bets are off If he dies, the Bills would be at or near the top of any list for possible relocation. Wilson has no known succession plan. He plans to have the team auctioned to the highest bidder. It's hard to imagine the top bid coming from someone who intends to keep the Bills in [the Buffalo] market.").

19. Christine H. Steinberg, *Developing Lease Agreements with Professional Sports Franchises*, 231 N.J. LAW 36, 37 (2004) (explaining why teams threaten to relocate and how threats of relocation can place pressure on teams and landlords alike).

20. See generally *id.* (recognizing sports teams often use threats of relocation to their advantage when negotiating with hosting municipalities and introducing notion that at least sometimes it may not be advantageous to hosting municipality to finance sports stadium construction).

projects can be extremely beneficial to both a team and its city by bolstering the revenue of businesses surrounding the stadium, fostering civic pride, generating national exposure, and fulfilling other public purposes.²¹ Conversely, opponents argue that the sum of these rewards is not substantial enough to outweigh the burden that is placed on the taxpayers by publicly financing such stadiums.²²

Although the merit of publicly financed sports venues is an issue that pervades the examination and eventual selection of financing options, it is not the focus of this comment.²³ This comment focuses primarily on the options available for the Bills and Erie County to finance stadium renovations and does not consider in depth whether Erie County, or any other municipal party, *should* be involved in the business of building and leasing sports stadiums.²⁴

This is not to say that the interests of the taxpayers should not be considered; to effectively negotiate and draft a new lease agreement, all affected parties must be granted the opportunity to be heard and those parties should use that opportunity to clearly state their positions as well as their interests.²⁵ For the Buffalo Bills, this necessitates a reconciling of the interests of Ralph Wilson (the owner and president of the Bills), the NFL (represented by Commissioner Roger Goodell), the economic interests of Erie County and New York State, the taxpayers of those hosting municipalities,

21. See Laurie C. Frey, Comment, *How the Smallest Market in Professional Sports Had the Easiest Financial Journey: The Renovation of Lambeau Field*, 18 SPORTS LAW J. 259, 261 (2011) (arguing “[t]he rewards of new or renovated stadiums are the creation of landmarks, the fulfillment of public purposes, the production of revenues, and the media exposure for both a team and its city”).

22. See Rodney Fort, Symposium, *Stadiums and Public and Private Interests in Seattle*, 10 MARQ. SPORTS L.J. 311, 332 (2000) (arguing that benefits of publicly funded stadiums are often overemphasized and such benefits may not be enough to justify public funding of sports stadiums).

23. For a further discussion of instances when taxpayers have challenged the legitimacy and legality of publicly financed stadiums, see *infra* notes 82-84 and accompanying text.

24. For a further discussion of NFL stadium financing options and an analysis of financing options available to the Bills, see *infra* notes 65-249 and accompanying text.

25. See generally *id.*; see also LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 18 (4th ed. 2009) (revealing that, “[i]n a position-based process, the parties’ goals are strictly opposed. In an interest-based process, the object is to reconcile interests, so both can, in some sense, ‘win’”); see also Carrie Menkel-Meadow, Comment, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984) (explaining “problem-solving model seeks to demonstrate how negotiators, on behalf of litigators or planners, can more effectively accomplish their goals by focusing on the parties’ actual objectives and creatively attempting to satisfy the needs of both parties, rather than by focusing exclusively on the assumed objectives of maximizing individual gain”).

and the political leaders who represent those taxpayers.²⁶ Only after all of these interests are considered can the Bills and Erie County structure an effective lease agreement.²⁷

In synopsis, several considerations underlie a successful lease agreement between the Buffalo Bills and Erie County.²⁸ These considerations necessarily focus on the financing options available for stadium renovations, including how the cost of renovations should be allocated amongst the parties, and what type of guarantees or early termination fees should be included to protect Erie County and the affected taxpayers in the event of franchise relocation.²⁹

II. BACKGROUND

Ralph Wilson Stadium is located in Orchard Park, New York, approximately ten miles south of downtown Buffalo, New York.³⁰ Before the construction of Ralph Wilson Stadium, the Bills played their home football games at War Memorial Stadium in Buffalo, New York.³¹ After the AFL and NFL merged in 1970, War Memorial Stadium was deemed inadequate for an NFL franchise due to its poor condition and its inadequate stadium capacity.³² The con-

26. See generally Mark Gaughan, *Delay Puts Buffalo Bills Stadium Lease in Jeopardy*, THE BUFFALO NEWS (Sept. 12, 2012, 9:56 AM), <http://blogs.buffalonews.com/press-coverage/2012/09/delay-puts-bills-lease-in-jeopardy.html> (recognizing difficulty in bringing all parties to “negotiating table” and expecting delays in future negotiation).

27. See Jerry Beach, *Blackout & Lease Issues Cloud Bills’ Future*, TICKET NEWS (July 24, 2012, 12:32 PM), <http://www.ticketnews.com/news/blackout-lease-issues-cloud-bills-future071224134> (reporting that there was “a sizable gap to be bridged in negotiations between the Bills and Erie County. The Bills are reportedly seeking at least \$200 million in stadium renovations as part of any new lease agreement, while Poloncarz told *The Buffalo News* he wants to make sure any lease . . . ‘keeps the Bills [in Buffalo] for many years to come.’”).

28. See Heaney, *supra* note 4 (reporting in April 2012 that, “it’s not too early to start posing questions about who should pay for what to keep the Bills in Buffalo. . . . [r]egarding Ralph Wilson Stadium, there are some key issues that need addressing”).

29. For a further discussion of the major issues that the parties must address before they execute an agreement, see *supra* notes 8-10 and accompanying text.

30. See Driving Distance from Buffalo, N.Y. to Orchard Park, N.Y., GOOGLE MAPS, <http://maps.google.com> (follow “Get Directions” hyperlink; then search “A” for “Buffalo, NY” and search “B” for “Orchard Park, NY”; then follow “Get Directions” hyperlink) (providing driving distance of fourteen miles and estimating direct distance from Buffalo to Orchard Park, New York to be approximately ten miles).

31. See *Buffalo Bills Stadium History*, BUFFALO BILLS HISTORY, <http://www.history.buffalobills.com/Stadium+History> (last visited Sept. 8, 2012) (providing history of Buffalo Bills franchise).

32. See *id.* (stating that “Buffalo War Memorial Stadium was both in disrepair and deemed undersized for a National Football League team, with a capacity of

struction of a new stadium became necessary, but the new stadium project was quickly surrounded by uncertainty and consternation, similar to the circumstances that surrounded the team and its home stadium in 2012.³³ Plans to construct an all-weather stadium in Lancaster, New York fell through and subsequently became the subject of several years of litigation.³⁴ In 1972, Erie County and the Bills franchise settled on a location in Orchard Park, New York.³⁵ Construction began in Orchard Park later that year and the stadium first opened for play in 1973.³⁶ That same year, the Bills and Erie County entered into a twenty-five year stadium lease agreement.³⁷ In 1998, when the twenty-five year lease expired, the two parties formed a new agreement extending the lease for fifteen more years.³⁸

A great deal of uncertainty has surrounded the Buffalo Bills franchise, leaving many wondering whether Buffalo can afford to keep the Bills, and if so, who should pay to keep them in Buffalo.³⁹ These are not easy questions to answer.⁴⁰ In April 2012, the Bills requested renovations to Ralph Wilson Stadium costing approximately \$200 million.⁴¹ While these proposed renovations might be considered meager compared to some other recent stadium upgrades within the league, the uncertainty surrounding the team's

under 47,000 (league mandates instituted after the merger dictated a minimum of 50,000 seats)").

33. *See id.* (indicating disagreement over where new Bills stadium should be located, resulting in prolonged litigation).

34. *See id.* (noting Bills did not pursue plans to build new stadium in Lancaster, New York); *see also* Kenford Co. Inc. v. Cnty. of Erie, 108 A.D.2d 132, 133-34 (N.Y. App. Div. 1989) (discussing breach of contract and damages stemming therefrom brought by investor who financed stadium that was never built in Lancaster, New York).

35. *See Buffalo Bills Stadium History, supra* note 31 (providing history of Buffalo Bills franchise and noting that in 1972, Erie County and Bills decided to build stadium in Orchard Park, New York).

36. *See id.* (revealing that stadium first opened for play in 1973).

37. *See id.* (indicating Bills and Erie County entered lease agreement for twenty-five years in 1973).

38. *See id.* (indicating Bills and Erie County entered second lease agreement for fifteen years in 1998).

39. *See* Heaney, *supra* note 4 (asking questions about "who should pay to keep the Bills in Buffalo" and noting "[t]he team's lease on Ralph Wilson Stadium expires in July 2013").

40. *See id.* (noting inability of parties to reach agreement with less than one year remaining on current lease agreement).

41. *See id.* (reporting that "sources are saying the cost of renovating the facility will run north of \$200 million").

ownership provides a complicating factor that must be considered before any substantial investment is made in the Bills' franchise.⁴²

Striking a new lease agreement between the Bills and Erie County is further complicated by several additional factors, perhaps the most important being the health of the team's elderly owner, Ralph Wilson, Jr.⁴³ Mr. Wilson is the founder, owner, and president of the Buffalo Bills, and his ownership dates back to the beginning of the American Football League in 1959, when he purchased the Buffalo Bills for \$25,000.⁴⁴ Before the start of the 2012 football season, Mr. Wilson was hospitalized for undisclosed reasons.⁴⁵ Mr. Wilson was released from the hospital before the Bills' final preseason game on August 30, 2012, and his family conveyed that he was "doing very well."⁴⁶ However, at the age of ninety-three, Mr. Wilson's health remained an issue as it was well documented that he often experienced issues with travel and mobility.⁴⁷ For example, throughout his ownership of the team Mr. Wilson enthusiasti-

42. See *id.* (noting "the cost of upgrading the home of the Green Bay Packers and Kansas City Chiefs ran \$295 million and \$400 million respectively," and recognizing that there are complicating factors involved in lease negotiations, asking "what guarantees should be built into an agreement to ensure the Bills remain [in Buffalo] after Ralph Wilson dies?").

43. See *Stadium Negotiations to Continue*, ASSOCIATED PRESS, Aug. 31, 2012, available at http://espn.go.com/nfl/story/_/id/8323478/lease-talks-ongoing-buffalo-bills-owner-ralph-wilson-hospital (reporting that ninety-three-year-old Ralph Wilson, Jr. "was listed in good condition after being taken to the hospital. Concerns about the Hall of Fame owner's health come at a critical juncture for the franchise he founded in 1960").

44. See Lou Raguse, *Ralph Wilson Center Dedicated in Canton*, WIVB.COM (Aug. 3, 2012, 10:58 AM), http://www.wivb.com/dpp/sports/bills_and_nfl/ralph-wilson-center-dedicated-in-canton (explaining that Mr. Wilson, at age 93, is oldest NFL owner); see also *Hall of Famers Ralph Wilson, Jr.*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/hof/member.aspx?PlayerId=281> (last visited Sept. 10, 2012) (describing Mr. Wilson as "the man responsible for reintroducing pro football to western New York when . . . he formed the Buffalo Bills in 1959"); Seth Wickersham, *Wilson Valued for Impact on Past, Future*, ESPN (Aug. 6, 2009), http://sports.espn.go.com/nfl/columns/story?columnist=wickersham_seth&id=4379510 (reporting that Mr. Wilson purchased Buffalo Bills franchise for \$25,000).

45. See *Stadium Negotiations to Continue*, *supra* note 43 (reporting "93-year-old Wilson was listed in good condition after being taken to the hospital").

46. See *id.* (affirming Mr. Wilson's improving health following hospitalization); see also *Schedule*, BUFFALO BILLS, <http://www.buffalobills.com/schedules/game-schedule.html> (last visited on Sept. 8, 2012) (indicating date of Bills' final preseason game as August 30, 2012).

47. See *Buffalo Bills Owner Ralph Wilson Hospitalized*, ASSOCIATED PRESS, Aug. 30, 2012, available at <http://www.usatoday.com/sports/football/nfl/story/2012-08-30/Ralph-Wilson-hospitalized-Bills/57450228/1> (explaining that Mr. Wilson has experienced mobility problems and travels less often); see also Raguse, *supra* note 44 (explaining Mr. Wilson had hip surgery in 2011 and concluding that "[a]t 93-years-old, [Mr. Wilson is] the oldest owner in the NFL and [he] doesn't get around like he used to").

cally attended both home and away games, but in 2011 he attended only one Bills home game.⁴⁸

The health of Ralph Wilson, Jr. is considered to be especially crucial to the future of the Buffalo Bills because there is no apparent ownership succession plan in place following his death.⁴⁹ Mr. Wilson intends to hold onto the team until he dies and, if no ownership succession plan is established by then, the team will be placed in a trust and sold to the highest bidder.⁵⁰ Consequently, rumors pertaining to the future of the team, including talk of relocation, have run rampant.⁵¹ For instance, widespread speculation surfaced predicting that the Bills could be bought and relocated to Los Angeles, a city seemingly desperate for an NFL team, as evidenced by the fact that the city approved plans to build a new NFL-caliber stadium without first acquiring an NFL franchise.⁵²

Other reports surfaced stating that Toronto, Ontario may be a likely destination for the Bills should the team be bought and relocated.⁵³ This rumor is bolstered by the fact that the Bills seem to have regional appeal in both Southern Ontario and Toronto, and that Canadian fans have a piqued interest in the Bills which is fur-

48. See *Buffalo Bills Owner Ralph Wilson Hospitalized*, *supra* note 47 (explaining that Mr. Wilson experienced trouble traveling in 2011 and 2012).

49. See Graham, *supra* note 17 (reporting Bills franchise is not likely to stay in Wilson family as there has been no “change of heart that someone within [Mr. Wilson’s] family would like to keep the team”); see also Mike Florio, *Bills are Trying to Make Buffalo More Enticing to the Next Owner*, NBC SPORTS (June 23, 2011, 9:41 AM), <http://profootballtalk.nbcsports.com/2011/06/23/bills-are-trying-to-make-buffalo-more-enticing-to-the-next-owner/> [hereinafter Florio II] (reporting that Bills do not appear to have any succession plan in place and once Mr. Wilson dies, Bills are likely to sell to highest bidder, who could decide that it “makes good business sense” to relocate Bills franchise).

50. See Graham, *supra* note 17 (reporting that NFL Commissioner Roger Goodell has stated, “Mr. Wilson has made it very clear that he is not going to sell the franchise while he’s alive, and once he passes on the franchise will be sold”); see also Breer, *supra* note 17 (reporting that upon Mr. Wilson’s death, Bills franchise will be placed in trust and then sold by Mr. Wilson’s heirs to highest bidder).

51. See Florio II, *supra* note 49 (reporting in 2011 that Buffalo Bills have “inched to the top of the ‘most likely to move to L.A.’ list”).

52. See *id.* (recognizing that Bills are amongst discussion for franchise relocation); see also Mike Florio, *L.A. is Prepared to Take a Team in 2013*, NBC SPORTS (Sept. 30, 2012, 3:18 PM), <http://profootballtalk.nbcsports.com/2012/09/30/l-a-is-prepared-to-take-a-team-in-2013/> [hereinafter Florio III] (indicating that L.A. is building new NFL-caliber stadium and is ready for team as early as 2013).

53. See Jason La Canfora, *NFL Will Return to L.A. but Loose Ends Remain; Who Arrives First? Rams? Chargers? Raiders?*, CBS SPORTS (July 9, 2012, 11:58 PM), <http://www.cbssports.com/nfl/story/19545793/nfl-will-return-to-la-but-loose-ends-remain-who-arrives-first-rams-chargers-raiders> (revealing that “Rogers Communications in Toronto would surely be interested” in purchasing Bills franchise “and building a world class facility in Canada would make things interesting” for future of Bills franchise).

ther strengthened by the team's 2008 agreement with Rogers Centre to play one home game per season at the Rogers Centre in Toronto for five consecutive years.⁵⁴ In 2012, the Bills extended this agreement, and the team is now scheduled to play one home game per season in Toronto through the 2017 season.⁵⁵ Speculation aside, no one knows exactly what the future holds for the Buffalo Bills, besides perhaps Mr. Wilson who, at the moment, appears content to take his plans for ownership succession, if any, to his grave.⁵⁶

Further complicating a new lease agreement is the fact that the Bills are a small market team located in a municipality in which the population has steadily declined over the last fifty years.⁵⁷ Population statistics, combined with the Bills' twelve-season playoff

54. See *id.* (stating "[t]here will be sufficient local ownership options when Ralph Wilson passes, and the NFL believes among Western and Central New York, Southern Ontario and Toronto, there is sufficient support to make it work with a new facility"); see also Albert Breer, *Five-Year Extension of Buffalo Bills' Toronto Series Approved*, NFL.COM (May 22, 2012, 4:07 PM), <http://www.nfl.com/news/story/09000d5d82943e05/article/fiveyear-extension-of-buffalo-bills-toronto-series-approved> [hereinafter Breer II] (explaining that "the Bills first played a home game in Toronto five years ago. According to the AP, roughly 15 percent of the team's fans are now from southern Ontario, and the series has corresponded with a rise in season-ticket sales to fans in that area.").

55. See Breer II, *supra* note 54 (indicating that "[t]he NFL's International Committee has approved a five-year extension of the Buffalo Bills' agreement to play games in Toronto, giving the team permission to continue the series from 2013 to 2017").

56. Compare Sam Farmer, *Roger Goodell Gives NFL Guidelines to Any Relocation to L.A.*, L.A. TIMES, June 30, 2012, at C2, available at <http://articles.latimes.com/2012/jun/29/sports/la-sp-nfl-la-goodell-20120630> (describing requirements set forth by NFL Commissioner Roger Goodell for NFL team relocation and specifically identifying "San Diego Chargers, Oakland Raiders, St. Louis Rams," and Jacksonville Jaguars as "relocation candidates" while making no mention of Buffalo Bills), and Tim Graham, *Goodell Emphasizes Importance of New Bills Lease*, THE BUFFALO NEWS, Aug. 9, 2011, at D6, available at www.buffalonews.com/sports/bills-nfl/article993416.ece (writing that NFL Commissioner Roger Goodell emphasized that "people want the Bills to stay [in Buffalo], a new stadium lease is 'a very high priority,' and the team will be sold after Ralph Wilson dies"), with Florio II, *supra* note 49 (reporting in 2011 that Buffalo Bills have "inched to the top of the 'most likely to move to L.A.' list"); see also Gov. Appoints Expert to Advise, ASSOCIATED PRESS, Aug. 8, 2012, available at http://espn.go.com/nfl/story/_/id/8247657/governor-andrew-cuomo-senator-charles-schumer-move-keep-buffalo-bills-town (reporting that Ralph Wilson, Jr. has no intention of selling Bills in his lifetime, essentially leaving it up to his heirs to sell team).

57. See James Walker, *AFC East on Forbes List*, ESPN (Sept. 8, 2012, 2:00 PM), http://espn.go.com/blog/afceast/post/_/id/47359/afc-east-on-forbes-list (explaining that Forbes valued Buffalo Bills to be worth \$805 million in 2012, making it fourth least valuable team in NFL); see also *Ouch! City's Population Down 10.7 Percent in Last Decade*, BUFFALO RISING (Mar. 24, 2011, 1:10 PM), <http://www.buffalo-rising.com/2011/03/ouch-citys-population-down-107-percent-in-last-decade.html> (reporting Buffalo's "population is down 31,338 since 2000 to 261,310 as of April 1 2010. Since 1950, the city's population has plummeted 54.9 percent from

drought, may explain why both the Bills and Erie County sought to make certain that they were not bearing a disproportionate cost and an unreasonable assumption of risk in striking a new agreement.⁵⁸

Substantial insight can be gained by focusing on the unique history of the Bills franchise.⁵⁹ In addition, an analysis of the financing and lease negotiation strategies pursued by other NFL teams can offer the Bills and Erie County a tremendous appreciation of common issues experienced by other NFL teams and strategies that have proven successful in resolving them.⁶⁰ Accordingly, this comment begins by exploring the financing alternatives that other NFL franchises have utilized for stadium construction and renovation.⁶¹ These alternatives will then be used to analyze the financing options available to the Bills and Erie County and New York State to finance the renovations to Ralph Wilson Stadium.⁶² The second part of this article is dedicated to an analysis of the tactics employed by NFL franchise hosting municipalities and the NFL itself to deter an NFL franchise from relocating.⁶³ In closing, this article analyzes the contracting options available to the Buffalo Bills and Erie County and New York State to deter the Bills from relocating.⁶⁴

580,132. Erie County also lost population in the last decade. The county's population is down 3.2 percent or 31,225 people.”).

58. See *Bills' Season Ticket Sales at 10-year low*, ASSOCIATED PRESS, Sept. 14, 2011, available at http://espn.go.com/nfl/story/_/id/6971142/buffalo-bills-hit-10-year-low-season-ticket-sales (explaining that in 2011, “[s]ix straight losing seasons, a poor economy and the NFL lockout are being blamed for contributing to the Buffalo Bills' lowest season-ticket sales total in a decade”); see also Darren Rovell, *Jets Have Highest Ticket Prices*, ESPN (Sept. 7, 2012, 12:27 PM), http://espn.go.com/nfl/story/_/id/8345872/average-nfl-ticket-price-jumps-25-percent (explaining that Bills average ticket price is one of cheapest in NFL with average ticket price of \$58.36).

59. For a further discussion of historical background of Buffalo Bills, see *supra* notes 30-58 and accompanying text.

60. For a further discussion of financing options NFL teams have used for stadium construction and contractual provisions used to deter relocation, see *infra* notes 65-193 and notes 250-288 and accompanying text.

61. For a further discussion of financing options NFL teams have used to fund stadium construction, see *infra* notes 65-193 and accompanying text.

62. For a further discussion and analysis of financing options available to Bills, see *infra* notes 194-249 and accompanying text.

63. For a further discussion of contracting provisions used by NFL teams to deter relocation, see *infra* notes 250-288 and accompanying text.

64. For a further discussion of contracting options as they relate to Buffalo Bills, see *infra* notes 289-322 and accompanying text.

III. FINANCING STADIUM CONSTRUCTION AND RENOVATIONS

A. Public Funding

Between 1997 and 2011, twenty NFL teams obtained new or refurbished stadiums with a majority of the financing for these stadiums obtained through public financing.⁶⁵ There are several different ways in which a stadium can be publicly financed.⁶⁶ The various approaches examined below offer different benefits and burdens that should be weighed by a team and its municipality before a public funding option is utilized.⁶⁷

1. *State and Local Subsidies*

MetLife stadium, home of the New York Jets and the New York Giants, is the only stadium currently used by NFL teams that was built without public funding or government subsidies.⁶⁸ The remaining thirty NFL stadiums were all constructed using some degree of public funding.⁶⁹ Accordingly, it is evident that substantial reliance is placed on public funding, including state and local subsidies, to finance the construction or renovation of NFL stadiums.⁷⁰

A major portion of the state and local subsidies used to finance stadium construction is generated by proceeds received from tax-exempt municipal bonds.⁷¹ The Tax Reform Act of 1986 set forth specific requirements that a municipality must follow for it to sub-

65. See *Recent NFL Stadiums*, NFL.COM (Mar. 2012), <http://prod.static.vikings.clubs.nfl.com/assets/docs/stadium/DES-recent-nfl-stadiums.pdf> (providing cost allocation of fifteen most recent NFL stadium projects).

66. See Frey, *supra* note 21, at 265-67 (explaining various methods used to finance sports stadiums).

67. For further discussion of various public financing options available to fund sports stadium construction, see *infra* notes 68-120 and accompanying text.

68. See Pat Garofalo, *How Americans Are Spending \$4 Billion Subsidizing Professional Sports Stadiums*, THINK PROGRESS (Sept. 5, 2012), <http://thinkprogress.org/economy/2012/09/05/801341/america-4-billion-sports-stadiums/> (reporting that MetLife stadium in New Jersey is “the only NFL stadium that was built without some sort of public support”).

69. See *id.* (reporting that “[t]ax exemptions on interest paid by muni bonds that were issued for sports structures cost the U.S. Treasury \$146 million a year, based on data compiled by Bloomberg on 2,700 securities. Over the life of the \$17 billion of exempt debt issued to build stadiums since 1986, the last of which matures in 2047, taxpayer subsidies to bondholders will total \$4 billion, the data show.”).

70. See *id.* (reasoning that thirty out of thirty-two NFL teams and hosting municipalities relied on some form of public funding to construct or renovate their home stadiums).

71. See Garofalo, *supra* note 68 (reporting that “[t]ax exemptions on interest paid by muni bonds that were issued for sports structures cost the U.S. Treasury \$146 million a year, based on data compiled by Bloomberg on 2,700 securities”).

dize the cost of stadium construction or renovation using tax-exempt bonds.⁷² These municipal bonds are typically sold to individuals with high marginal tax rates because the tax-exempt aspect of the bonds often allow for a greater after-tax rate of return than investments carrying comparable risk that are not tax-exempt, making them especially attractive to high-income individuals.⁷³ Almost all stadium construction or renovation projects involve utilizing some form of tax-exempt municipal bonds; consequently, these bonds are commonly viewed as one of the most effective sources of public funding aimed at subsidizing stadium construction and renovation projects.⁷⁴

Government subsidies for stadiums can also be made through more indirect methods.⁷⁵ For example, some stadiums receive an exemption from property taxes, which often translates into a franchise saving several million dollars a year.⁷⁶ Sales tax exemptions may also be available on materials used in stadium construction.⁷⁷ This indirect form of a subsidy was included in the proposal recently considered in Minnesota to subsidize the construction of a new stadium for the Minnesota Vikings.⁷⁸ Finally, many teams receive substantial subsidies from the state or local government for stadium operating costs.⁷⁹ For example, the Buffalo Bills' current

72. See Frey, *supra* note 21, at 265 (explaining that “[i]n order to qualify for the bonds, ‘a project may exceed only one of the following criteria: 10 percent of the bond proceeds must be used by a nongovernmental entity; or 10 percent of the debt secured by property must be used directly or indirectly in a private business.’”).

73. See Andrew H. Goodman, Note, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 198 (2002) (explaining appeal of tax-exempt bonds used to raise capital for stadium construction or renovation).

74. See generally *id.* (noting that issuing tax-free municipal bonds is frequently used to finance stadium construction or renovation projects).

75. For a further discussion of more indirect ways in which municipalities may subsidize cost of renovated or new stadium, see *infra* notes 76-80 and accompanying text.

76. See Garofalo, *supra* note 68 (reporting that “Dallas Cowboys owner Jerry Jones pays no property taxes on Cowboys Stadium, saving his franchise \$17 million per year”).

77. See Mike Ozanian, *Minnesota Vikings Asking for Stadium Taxpayer Subsidy of \$77 Per Ticket*, FORBES (Apr. 28, 2012), <http://www.forbes.com/sites/mikeozanian/2012/04/28/minnesota-vikings-asking-for-stadium-taxpayer-subsidy-of-77-per-ticket/> (explaining that when calculating total public subsidies, sales tax exemptions on construction materials must be taken into consideration).

78. See *id.* (reporting that financing for new stadium in Minnesota includes property tax exemption on stadium and parking ramps and sales tax exemption on construction materials used to build new stadium).

79. See Heaney, *supra* note 4 (reporting that under current lease, Bills operating subsidy of \$111 million is greater than capital costs of \$101 million).

lease provided for operating subsidies totaling approximately \$111 million in operating costs over a fifteen-year period.⁸⁰

Taxpayers who oppose public financing for the construction or renovation of sports stadiums view such subsidies as greatly benefiting team owners while placing a heavy debt on the city and state.⁸¹ It is no surprise that these types of subsidies have led to several lawsuits brought by taxpayers protesting the use of public funds for stadium financing.⁸² Thus far, such taxpayer lawsuits have been unsuccessful because courts recognize that there is some public purpose served by the construction of professional sports stadiums.⁸³ As long as there is some degree of public purpose served by stadium construction, public funds may be allocated to fund such stadium projects.⁸⁴

2. *Increase State and Local Sales Taxes*

Use of state and local sales taxes can be an effective method by which a team can finance a portion of the cost for a stadium construction or renovation project.⁸⁵ Generally, a sales tax applies to certain tangible personal property or services.⁸⁶ A sales tax increase levied upon the citizens of a town, city, or county can be used to

80. See *id.* (acknowledging that public currently pays for substantial portion of Bills' operating costs under current lease agreement, which provides operating subsidies totaling approximately \$111 million over fifteen years).

81. See Greenberg, *supra* note 13, at 388 (describing arguments opposing use of public funding to finance sports stadiums).

82. See generally *Poe v. Hillsborough Cnty.*, 695 So.2d 672 (Fla. 1997); *Rowe v. Pinellas Sports Auth.*, 461 So.2d 72 (Fla. 1984); *King Cnty. v. Taxpayers of King Cnty.*, 949 P.2d 1260 (Wash. 1997) (presenting taxpayer lawsuits against state and local governments for publicly funding construction of sports stadiums).

83. See *Poe*, 695 So.2d at 679 (validating use of bonds to construct NFL stadium in Tampa Bay, Florida and finding "that the Buccaneers instill civic pride and camaraderie into the community and that Buccaneer games and other stadium events also serve a commendable public purpose by enhancing the community image on a nationwide basis and providing recreation, entertainment and cultural activities to its citizens"). "[L]ittle has been done to influence the ability of the electorate to challenge a legislature's actions or the understanding of taxpayer rights." Elan Daniels, Note, *The Cincinnati Bengals' Legal Obligation to Win: A Case Study for the Public Funding of Stadiums and a Roadmap for Municipal Investment*, 5 TEX. REV. ENT. & SPORTS L. 99, 112 (2003) (recognizing that recent litigation brought by taxpayers questioning validity of publicly financed sports stadiums have led public purpose doctrine to become increasingly "toothless").

84. See *Poe*, 695 So.2d at 679 (emphasizing requirement that public financing of sports stadiums must provide some public purpose).

85. See Goodman, *supra* note 73, at 194-97 (exploring use of sales tax to finance sports stadiums).

86. See *Sales and Use Tax*, N.Y. STATE DEP'T OF TAXATION, <http://www.tax.ny.gov/bus/st/stdix.htm> (last visited Oct. 30, 2012) (defining sales tax in New York State).

target a specific geographic area that derives benefits from the presence of a professional sports team.⁸⁷ Several hosting municipalities of NFL teams have increased sales taxes to finance a portion of stadium construction or renovations.⁸⁸

In some instances, a sales tax increase on hosting municipalities of NFL teams has been successful.⁸⁹ When the Green Bay Packers renovated their home stadium in 2003, part of the financing for the renovations came from a sales tax increase of 0.5 percent across Brown County, the hosting municipality of the Packers.⁹⁰ Although the increase in sales tax barely received the support of a majority of voters in Brown County, it proved to be successful because it was implemented in conjunction with proper planning and oversight to ensure that taxpayer money would not be wasted.⁹¹ In fact, as of 2011, it was anticipated that the funding received from the Brown County sales tax increase will be paid off sooner than expected.⁹²

Nevertheless, there are several concerns with obtaining financing through a sales tax increase.⁹³ First, there is no guarantee that

87. See *Sales Tax Rates and Identifying the Correct Local Tax Jurisdiction*, N.Y. STATE DEP'T OF TAXATION, http://www.tax.ny.gov/bus/st/sales_tax_rates.htm (last visited Oct. 30, 2012) (providing sales tax rates for various tax jurisdictions in New York State).

88. See *Recent NFL Stadiums*, *supra* note 65 (indicating that six hosting municipalities of NFL teams raised local sales taxes to finance portion of stadium construction or renovation during last fifteen years). The lowest sales tax increase was in Denver where sales tax increased by 0.1 percent across multiple counties. See *id.* (exhibiting public funding sources used to construct Invesco Field at Mile High). Highest sales tax increases were in Dallas, Tampa Bay, Cincinnati, and Green Bay, where sales tax increased by 0.5 percent in hosting cities or counties. See *id.* (exhibiting public funding sources used to construct Cowboys Stadium, Raymond James Stadium, and Paul Brown Stadium and public funding sources used to renovate Lambeau Field).

89. See Frey, *supra* note 21, at 281 (recognizing that financing of stadium in Green Bay included 0.5 percent sales tax increase and concluding that financing renovations of stadium in Green Bay "was more successful than financing other stadiums in the past").

90. See *id.* at 274 (explaining that sales tax increase of 0.5 percent was utilized to provide additional source of public funding for renovation of Lambeau Field).

91. See *id.* (indicating that vote for increase in sales tax passed with 53 percent support from taxpayers in affected county); see also *id.* at 281 (explaining that stadium renovations in Green Bay "finished on budget, which saved citizens of Brown County from paying more money than originally estimated").

92. See *id.* at 280-81 (explaining that Brown County tax will likely be paid off ahead of schedule and Brown County tax will end sometime in 2015).

93. See Reed Albergetti & Cameron McWhirter, *A Stadium's Costly Legacy Throws Taxpayers for a Loss*, WALL ST. J., July 21, 2011, at A1, available at <http://online.wsj.com/article/SB10001424052748704461304576216330349497852.html> (describing reality of counties facing financial hardship after financing stadiums, specifically examining problems encountered from sales tax increase in Hamilton County, hosting municipality of Cincinnati Bengals).

an increase in the applicable sales tax rate for a city or county will translate into a corresponding increase in sales tax revenue.⁹⁴ If sales tax revenue decreases or if the sales tax revenue fails to increase as projected, municipalities may be forced to refinance a portion of the debt incurred from stadium renovations or seek alternative sources of financing long after stadium renovations have been completed.⁹⁵ Additionally, even in a city or county with exceptional fan loyalty and team support, a sales tax increase intended to finance renovations to a sports stadium is often a controversial topic that can create much debate.⁹⁶

3. *Public Ownership*

Public ownership is the least common method employed by NFL franchises to finance stadium construction and renovation.⁹⁷ In fact, the only team in the NFL that is publically owned is the Green Bay Packers, which is owned by the surrounding community of Green Bay, Wisconsin.⁹⁸ Even though the Packers have been publicly owned for almost ninety years, in 1997 the team offered a sizeable stock sale to obtain funds to finance the renovation of Lambeau Field, the home stadium of the Packers.⁹⁹ The Packers' stock offers no tangible benefits to its owners; the stock does not offer free tickets nor does it offer any return on investment, since all of the team's profits are retained and reinvested back into the franchise.¹⁰⁰

94. See *id.* (revealing Cincinnati Bengals used sales tax increase to finance portion of new stadium construction cost, but explaining that as soon as new stadium was completed, sales tax revenue decreased and county was forced to refinance its debt).

95. See *id.* (explaining that in Cincinnati, "[t]o help finance its stadiums, Hamilton County assumed more than \$1 billion in debt by issuing its own bonds without any help from the surrounding counties or the state. As debt service ratchets up, officials expect debt payments to create a \$30 million budget deficit by 2012.").

96. See Frey, *supra* note 21, at 274 (indicating that vote for increase in sales tax to support stadium renovations to Lambeau Field passed with only 53 percent support from taxpayers of Brown County).

97. See *id.* at 272 (stating that only Green Bay Packers use public ownership model in NFL).

98. See *id.* (indicating Green Bay Packers are only publicly owned team in NFL).

99. See *id.* at 274 (stating that Green Bay Packers have been publicly owned since 1923 and in 1997, Green Bay Packers offered significant stock sale).

100. See Patrick Hruby, *The Right Way? The Green Bay Way*, ESPN (Jan. 31, 2011), <http://sports.espn.go.com/espn/commentary/news/story?page=hruby/110131> (reporting that Packers' ownership includes "112,158 shareholders who own 4.7 million shares. Only none of those individuals receives dividends. They don't even get free tickets.").

Although the stock sale generated only \$24 million of the \$295 million required to renovate Lambeau Field, there are other reasons why public ownership is so advantageous.¹⁰¹ In addition to providing an influx of capital, public ownership inherently helps a team and its supporting community avoid issues of ownership instability and relocation.¹⁰² This is due to the overwhelming likelihood that a majority of the team's stock will be bought by fans in the team's current market.¹⁰³ In the case of the Packers, the fans' investment in the team permeates the franchise.¹⁰⁴ This is most obviously reflected by the Packers' bylaws, which limit the number of shares that one person can acquire and states that in the event the team is sold, all proceeds from the sale shall be reinvested in the community through public charities.¹⁰⁵

Even though the Packers franchise has enjoyed tremendous success with its public ownership model, this arrangement would be difficult, if not impossible for an NFL team to replicate today.¹⁰⁶ This is because the NFL has forbidden public ownership of NFL franchises since 1961, allowing exceptions only for teams already organized through public ownership.¹⁰⁷ It would be extremely difficult for a team to persuade the NFL to change this policy without

101. See Frey, *supra* note 21, at 274 (reporting total cost of renovations at \$295 million and stating that public sale generated \$24 million, while increasing shareholders from 1,940 to 109,723). For a further discussion of other advantages of the public ownership model, see *infra* notes 102-105 and accompanying text.

102. See Robert Taylor Bowling, *Sports Aggravated: The Fan's Guide to the Franchise Relocation Problem in Professional Sports*, 28 STETSON L. REV. 645, 666-67 (1999) (explaining why public ownership helps sports franchises avoid issues of relocation).

103. See *id.* (reasoning that "[a] team owner in Atlanta would not likely find a greater market for stock in his team outside the geographic area that the team calls home. Thus, a franchise seeking to raise money through a stock sale would rely on the local fans to raise money.").

104. See Hruby, *supra* note 100 (detailing specifics of Green Bay Packers' public ownership model and recognizing beneficial safeguards which public ownership can provide).

105. See *id.* (exploring Green Bay Packers' bylaws and specifically identifying limits on team stock acquisition and sale proceed reinvestment protocol).

106. See Bowling, *supra* note 102, at 665 (recognizing that former NFL commissioner Paul Tagliabue believed that "the Green Bay Packers are a 'historical anomaly' that could never be replicated in today's sports climate").

107. See Bowling, *supra* note 102, at 665 (explaining that public ownership is no longer allowed in NFL); see David Morris, *Roots, Roots, Roots for the Home Team: Community Owned Professional Sports*, INST. FOR SELF-RELIANCE (Apr. 1, 1998), <http://www.ilsr.org/roots-roots-roots-home-team-communityowned-professional-sports/> (stating that NFL banned public ownership in 1961).

challenging the NFL bylaws in court or obtaining congressional intervention.¹⁰⁸

Even if the policy prohibiting public ownership in the NFL could be circumvented, community ownership would not work for every NFL team because public ownership of a sports franchise creates an inefficient management structure and places a heavy emphasis on public funding for stadium construction and renovation, which many taxpayers oppose.¹⁰⁹ Although these circumstances make it extremely difficult for a team to establish public ownership, the Green Bay Packers' arrangement encourages other teams to devise novel and creative solutions to inadequate stadium financing and ownership instability.¹¹⁰

4. *Other Sources of Public Funding*

A creative financing solution to provide public funding for stadium renovations need not be as radical as the Green Bay Packers' model of public ownership.¹¹¹ There are several other sources of public funding available for stadium development, and while these financing options may not finance an entire stadium project by themselves, collectively they can contribute a substantial amount of funding to the construction or renovation of a stadium.¹¹² For example, cutting a portion of municipal public services to make more capital available for the project could provide an influx of capital

108. See Daniels, *supra* note 83, at 148 (stating that issue of public ownership would arise when NFL team attempted to move because there would be conflict between NFL bylaws and state laws, leading to litigation). See generally Morris, *supra* note 107 (examining "Give Fans A Chance Bill" heralded by Representative Earl Blumenauer designed to overturn rule against public ownership and provide that team give community sufficient notice and opportunity to purchase team before relocation, among other protections against relocation).

109. See Frey, *supra* note 21, at 274 (explaining that public ownership "may not be as successful for . . . teams with a weaker fan base"); see Daniels, *supra* note 83, at 155 (indicating that "[t]here is likely to be strong opposition [to public ownership] by taxpayers who have been against the funding of stadiums from the start. Moreover, there is likely to be gross inefficiencies created through public management of teams"). For a further discussion of taxpayer objections to publicly financed stadiums, see *supra* notes 82-84 and accompanying text.

110. See generally Frey, *supra* note 21 (examining interesting and unique nature of Green Bay Packers' ownership model).

111. See generally *id.* (exploring various options available to NFL teams and hosting municipalities for stadium financing). For a further discussion of other sources of public financing available to NFL teams to finance stadium renovation or construction, see *infra* notes 112-117 and accompanying text.

112. See Goodman, *supra* note 73, at 196 (stating that "there are several financing options that public officials may utilize in subsidizing a stadium, and often more than one are employed in concert"); see also Frey, *supra* note 21, at 266 (introducing several sources of revenue available to finance stadiums such as budget cuts, sin taxes, and amusement taxes).

that could be redistributed to a stadium project.¹¹³ The concern with this financing strategy is that many municipalities are financially stretched and many public services have already been cut in response to poor economic conditions.¹¹⁴

Another alternative is for the local government to create “sin taxes,” or excise taxes placed on products such as alcohol or tobacco.¹¹⁵ Similarly, an amusement tax collected from entrance fees at nightclubs, theatres, and sporting events has been utilized by at least one NFL team as a revenue source for stadium financing.¹¹⁶ These types of taxes may be unpopular with some people, but like any use tax, a citizen is not compelled to pay this tax unless he or she chooses to partake in the specified taxable activity, making this type of tax less inclusive than a general increase in sales tax.¹¹⁷

While there are several other methods of generating public financing, the examples above provide a solid foundation for franchises and governments to cater their financing efforts to their respective region and team.¹¹⁸ Moreover, and importantly, there are many ways to generate public financing.¹¹⁹ The means are limited only by the creativity of the municipality and its state and local representatives.¹²⁰

113. See Frey, *supra* note 21, at 266 (exploring state and municipal budget cuts for other public services as method for freeing up capital to finance stadium construction or renovation).

114. See Karen DeWitt, *State Officials Predict Tight Budget*, WNYC (Oct. 8, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/oct/02/state-officials-predict-tight-budget/> (reporting that New York State is “preparing for another difficult budget year” and state agencies have been advised to refrain from adding additional spending to budget after \$10 billion was cut from New York State budget only two years ago).

115. See Goodman, *supra* note 73, at 196 (arguing that sin taxes may be used as source of revenue for financing of stadium and such taxes “face minimal opposition from politicians and voters, likely because of implications of moral correctness”).

116. See Frey, *supra* note 21, at 266 (explaining that Baltimore Ravens used “amusement taxes collected from fees at nightclubs, theatres, and sporting events” to finance M&T Bank Stadium).

117. See Goodman, *supra* note 73, at 196 (explaining that these taxes do not “include the entire geographic attendance region”).

118. See *id.* at 194 (stating that “[e]ach stadium effort, along with its corresponding municipality, aims to fashion a revenue raising strategy unique to the particularities of local citizenry, public obligations, and the goals of the projects”).

119. See generally Goodman, *supra* note 73, at 194 (exploring several possibilities for hosting municipality to publically finance sports stadium).

120. See generally Frey, *supra* note 21, at 266 (highlighting creative solutions to generate public financing, such as Amusement Tax utilized in Baltimore, Maryland).

B. Major Sources of Private Funding

In contrast to public sources of funding, several private sources of funding are available to NFL franchises to build or renovate sports stadiums.¹²¹ Between 1997 and 2011, twenty NFL stadiums were built or refurbished.¹²² These twenty stadiums obtained an average of fifty-nine percent of their financing through public sources and forty-one percent from private sources.¹²³ Accordingly, private funding is a source of stadium financing that must be thoroughly explored by an NFL team wishing to build or renovate a stadium.¹²⁴

1. G4 Loan

The NFL's G4 loan program provides funds for NFL teams seeking to finance renovation or new stadium projects.¹²⁵ Under the most recent collective bargaining agreement in 2011, the NFL approved the G4 loan program, which provides loans of up to \$250 million to NFL franchises for stadium renovations and up to \$200 million for new stadium construction.¹²⁶ The loan is financed by a percentage of the NFL league revenue generated from premium seating sales and the terms of the loan provide that it must be paid back over a fifteen-year period.¹²⁷

121. For a further discussion of major sources of private funding for NFL teams, see *infra* notes 122-193 and accompanying text.

122. See *Recent NFL Stadiums*, *supra* note 65 (listing twenty NFL stadiums built or renovated between 1997 and 2011).

123. See *id.* (listing public and private contribution percentages for new or renovated NFL stadiums from 1997-2011 and indicating average of 58.8 percent of financing was provided by public funding and 41.2 percent of financing was provided by private funding, based on calculations made from specific stadium statistics).

124. See *generally id.* (finding average of 41.2 percent of cost for stadiums constructed between 1997 and 2011 was financed by private funding).

125. See Jaboner Jackson, *NFL in LA: New NFL Television Contracts and G4 Stadium Financing*, FOOTBALLPHDS.COM (Dec. 15, 2011), <http://www.footballphds.com/2011/12/15/nfl-in-la-new-nfl-television-contracts-and-g4-stadium-financing/> (reporting that G4 program allows teams to receive loan from NFL for specific purpose of providing source of funding for stadium construction and renovation).

126. See *id.* (explaining that, "[u]nder the newest Collective Bargaining Agreement (CBA) signed this year between the NFL Owners and NFL Players Association, a provision for revenue credits was included in the CBA that amounted to stadium credits of 1.5% of total league revenue," and stating that new G4 loan program provides for up to \$200 million loan for new stadium and up to \$250 million for stadium renovation to be repaid over fifteen years through premium seating revenue).

127. See *id.* (indicating "repayment of G4 financing by the team over 15 years through revenues related to premium seating").

The predecessor of the G4 program, the G3 program, was introduced in the NFL in response to the Stadium Financing and Franchise Relocation Act of 1999.¹²⁸ When an NFL team plays an away game at another team's stadium, the visiting team is entitled to receive a portion of the home team's ticket sales revenue.¹²⁹ The G3 program operated by retaining a portion of the visiting teams' share of revenue and placing it into a league fund that was used solely for construction and renovation projects.¹³⁰

Although the G4 program is relatively new, its structure and purpose is similar to that of the G3 program, under which several franchises successfully obtained loans from the NFL to provide a portion of the capital required for stadium construction.¹³¹ The benefit of this type of league-funded loan is that it partially offsets a portion of the funding that is usually obtained through public sources.¹³² By utilizing the G4 program, less reliance is placed on public funding for stadium construction or improvements.¹³³

Additionally, the G4 program provides teams with an immediate source of capital.¹³⁴ Although the benefit of a G4 loan has yet to be realized by an NFL team, the immediate access to capital is what influenced the Minnesota Vikings to consider borrowing funds from the G4 program to construct a new stadium.¹³⁵ In the

128. See Greenberg, *supra* note 13, at 394-95 (summarizing Stadium Financing and Relocation Act of 1999 and explaining that Act required NFL "to make available to a local government entity upon request from the amounts in the trust fund, assistance for the cost of construction or renovation of playing facilities to be used by a member club in that league, up to a maximum of one-half of that cost").

129. See *Bills Won't Bend on TV Blackout Issue*, BUSINESS FIRST (July 13, 2012, 1:27 PM), <http://www.bizjournals.com/buffalo/news/2012/07/13/bills-wont-bend-on-tv-blackout-issue.html?page=all> (explaining that share of visiting team revenue is typically 34 percent of ticket sales).

130. See Goodman, *supra* note 73, at 220 (explaining how G3 program created pool of revenue "for the express purpose of constructing football stadiums").

131. See Jackson, *supra* note 125 (stating that new G4 loan program provides for up to \$200 million loan for new stadium, \$50 million more than G3 program); see also Daniels, *supra* note 83, at 148 (explaining that as of 2003, the G3 program "has awarded \$650 million out of a possible \$800 million . . . to fortunate recipients in Boston/New England, Chicago, and Green Bay among others").

132. See Daniels, *supra* note 83, at 148 (explaining that "the G3 loan program . . . allow[s] elected officials to incur less debt on behalf of the cities because the G3 loans are reimbursed out of visiting teams' ticket revenues").

133. See *id.* (noting that by providing additional private source of financing, G3 loan allowed hosting municipalities to incur less debt).

134. For a further discussion of advantages to G4 program, see *infra* notes 135-137 and accompanying text.

135. See Tom Pelissero, *Vikings Lobbying Owners, Meet With Chair of NFL Finance Committee*, ESPN TWIN CITIES (Apr. 2012), <http://m.1500espn.com/pages/sports.wire.php?SID=4394> (stating that "[t]he Vikings have pledged \$427 million towards the upfront costs of the \$975 million project. That contribution is expected to

spring of 2012, the Vikings planned to use the G4 program to borrow \$200 million, the full amount allowable under the program for new stadium construction.¹³⁶ The loan program allows for the loan to be repaid through premium seating revenue paid over a term of fifteen years, making its terms attractive to a team, such as the Vikings, in need of immediate capital to finance its stadium project.¹³⁷

Despite its apparent benefits, a G4 loan may not be a viable option for every team.¹³⁸ The G4 program requires an NFL team to contribute its own funds toward the stadium construction or renovation cost in order to receive G4 funds.¹³⁹ The loan is essentially a matching agreement, stipulating that an NFL franchise may receive funding from the NFL only up to the amount that the franchise itself contributes.¹⁴⁰ Thus, a team lacking sufficient cash to contribute to the cost of construction or renovation would be denied the full benefits of a G4 loan.¹⁴¹ Moreover, the new G4 program places a cap on NFL funding at \$200 million for new stadium projects and \$250 million for stadium renovation projects.¹⁴²

include a loan of up to \$200 million under the NFL's G4 program that would be repaid through revenue from premium seating revenues normally shared among the other 31 teams.").

136. *See id.* (indicating that Minnesota Vikings plan to enter into \$200 million loan agreement with NFL).

137. *See* Jackson, *supra* note 125 (finding that new G4 loan program provides up to \$200 million in loans for new stadium to be repaid with fifteen years of premium seating revenue).

138. For a further discussion of constraints on teams' access to G4 loans, see *infra* notes 139-141 and accompanying text.

139. *See 2011 Resolution G-4*, Section 1, available at http://media.signonsandiego.com/news/documents/2011/12/14/NFL_on_its_new_stadium_loan_program.pdf (last visited Mar. 6, 2013) (providing 2011 G-4 Resolution, which states in relevant part, "[t]hat for any stadium construction project (new stadium or stadium renovation costs of which will exceed \$50 million) involving a private investment for which an affected club or its affiliated stadium entity ('Developing Club') makes a binding commitment, [the NFL] shall provide funding . . . of up to \$200 million in the aggregate to the Developing Club [and up to \$250 million for stadium renovation] to support such project based on the amount that the Developing Club has committed or that will be applied to such project . . ." through the issuance of equity, PSL proceeds, or club seat premiums).

140. *See* Tim Graham, *Sen. Charles Schumer's Letter to Roger Goodell*, THE BUFFALO NEWS (Aug. 8, 2012), <http://blogs.buffalonews.com/press-coverage/2012/08/charles-schumers-letter-to-roger-goodell.html> (detailing Senator Charles Schumer's letter to Roger Goodell within which Mr. Schumer states, "[G4] program could be of tremendous benefit to the Buffalo Bills and local taxpayers because it would match any stadium investment the Bills make between \$25M and the total costs of renovations").

141. *See id.* (noting that G4 program requires franchise to make investment in stadium matching G4 loan amount).

142. *See* Jackson, *supra* note 125 (stating that new G4 loan program provides for up to \$200 million loan for new stadium and up to \$250 million for stadium renovation to be repaid over fifteen years through premium seating revenue).

2. *Contribution From the NFL Franchise Itself*

A recent trend in financing professional sports stadium construction is the fusion of public and private funding.¹⁴³ This fusion is what funded the two most recent NFL stadiums, Cowboys Stadium in Arlington, Texas and MetLife Stadium in East Rutherford, New Jersey.¹⁴⁴ Construction of Cowboys Stadium cost approximately \$1.2 billion.¹⁴⁵ Roughly two-thirds of the total stadium construction cost was financed privately, including a \$525 million contribution from the Dallas Cowboys franchise itself and a \$150 million loan from the NFL's G3 program.¹⁴⁶ MetLife Stadium was financed entirely by private sources, including a \$300 million loan from the G3 loan program.¹⁴⁷

Notwithstanding the construction of Cowboys Stadium and MetLife Stadium, projects financed through a majority of private funding remain the exception to stadium financing in the NFL, not the trend.¹⁴⁸ Moreover, these exceptions are likely particular to Cowboys Stadium and MetLife stadium because they are home to three of the most valuable franchises in the NFL.¹⁴⁹ Other recent

143. See Frey, *supra* note 21, at 264 (revealing that “[a]lthough some stadiums are financed entirely with public money, a recent trend is toward mixed financing and ownership with a combination of public and private funding”).

144. See *Taking a Look at New and Remodeled NFL Stadiums*, ST. LOUIS POST-DISPATCH (May 20, 2012), http://www.stltoday.com/sports/football/professional/taking-a-look-at-new-and-remodeled-nfl-stadiums/article_c4769793-55f4-58f8-9de5-fdea9fb07a3.html (summarizing costs and sources of financing for Cowboys Stadium and MetLife Stadium).

145. See *id.* (detailing that “[a]bout two-thirds of construction costs were paid with private money – \$525 million from the team, which also borrowed \$150 million from the NFL. For the public portion, voters in Arlington passed a \$325 million bond issue that raised the city’s sales, hotel-occupancy and car-rental taxes. Additional financing comes from ticket and parking taxes levied in and around the stadium.”).

146. See *id.* (indicating that Dallas Cowboys franchise contributed \$525 million toward construction of Cowboys Stadium in Arlington, Texas).

147. See *id.* (revealing that “Giants and Jets split cost, with help of \$300 million loan from NFL. The teams, however, got free land for the stadium, which also gets a break on property taxes.”); see also Jaboner Jackson, *Stadium Geek Week: G3 Financing*, FOOTBALLPHDS.COM, (July 19, 2011), <http://www.footballphds.com/2011/07/19/stadium-geek-week-g3-financing/> [hereinafter Jackson II] (stating that “[u]nder the last iteration of G3 financing, each team was eligible for up to \$150 million in G3 financing. Accordingly, [MetLife] Stadium received \$300 million since the stadium had two teams, the New York Giants and New York Jets.”).

148. For a further discussion of other recent stadium projects that received majority of financing from public as opposed to private sources, see *supra* note 65 and accompanying text.

149. See Mike Ozanian, *Cowboys Most Valuable Team*, FORBES (Sept. 5, 2012), <http://www.forbes.com/nfl-valuations/> [hereinafter Ozanian II] (ranking Dallas Cowboys as most valuable NFL team, New York Giants as fourth most valuable NFL team, and Jets as sixth most valuable NFL team).

stadium construction projects provide a more representative portrayal of the balance typically struck between public and private financing.¹⁵⁰

The construction of Lucas Oil Stadium in Indianapolis, Indiana and the renovation of Arrowhead Stadium in Kansas City, Missouri were completed in 2008 and 2011, respectively and relied significantly, but secondarily, on private financing.¹⁵¹ In 2008, the Indianapolis Colts constructed the \$720 million Lucas Oil Stadium.¹⁵² Eighty-six percent of the construction costs came from public funds, generated by increases in restaurant, car rental, and hotel taxes, among other sources.¹⁵³ The Colts franchise contributed only \$100 million to the \$720 million stadium.¹⁵⁴ In 2011, the Kansas City Chiefs completed a \$388 million renovation to Arrowhead Stadium.¹⁵⁵ The Chiefs contributed \$125 million, or approximately thirty-two percent of the total renovation cost.¹⁵⁶ The remaining cost of \$263 million, or sixty-eight percent of the renovation cost, was publicly financed through a 0.375 percent county sales tax increase and a state tax credit.¹⁵⁷

In early 2012, the San Francisco Forty-Niners entered into an agreement with the City of Santa Clara, California to construct a new stadium.¹⁵⁸ The estimated cost of building the new stadium was \$1.18 billion, including up to \$878 million in public funds, or

150. *See Recent NFL Stadiums*, *supra* note 65 (detailing public funding sources for recent NFL stadium improvements and constructions).

151. *See id.* (indicating that Lucas Oil Stadium was constructed with eighty-six percent public financing and Arrowhead Stadium was renovated with sixty-eight percent public financing).

152. *See id.* (referencing that Lucas Oil Stadium was constructed in 2008 at total cost of \$719.6 million).

153. *See id.* (noting that public financing included following sources: “3% Marion County hotel tax increase, 2% County car rental tax increase, 1% County restaurant tax increase, 1% County admissions tax increase, 1% Increases in restaurant taxes in six other counties, [and] Sales of Colts license plates”).

154. *See id.* (showing \$100 million total private contribution toward funding of Lucas Oil Stadium Renovations).

155. *See id.* (indicating that Arrowhead Stadium was renovated in 2011 at total cost of \$388.4 million).

156. *See id.* (showing \$125 million total private contribution toward funding of Arrowhead Stadium renovations).

157. *See id.* (noting that public financing included 0.375 percent county sales tax increase and sales tax credit).

158. *See San Francisco 49ers Football Stadium in the City of Santa Clara*, CITY OF SANTA CLARA, <http://santaclaraca.gov/index.aspx?page=1197> (last visited Jan. 9, 2013) (stating that on February 14, 2012, City of Santa Clara “[a]pproved the Design-Build Agreement with Turner Devcon Joint Venture and Forty-Niners Stadium, LLC for construction of a professional football stadium, and approved the Construction Agency Agreement with Forty-Niners Stadium, LLC for administration and management of stadium construction”).

approximately seventy-three percent of the total construction cost, earmarked for allocation to the stadium project.¹⁵⁹ Interestingly, the agreement included language stating that the Forty-Niners were to cover any cost over-runs above the \$878 million public funding budget, which proved beneficial to the municipality because the estimated cost of construction increased after the parties entered into agreement.¹⁶⁰

It should be noted, however, that the Forty-Niners experienced early complications in obtaining some of the funding allocated to the stadium construction under the agreement.¹⁶¹ In June 2012, Santa Clara County withheld \$30 million in public funding earmarked for stadium construction and reallocated the \$30 million for use in various public services.¹⁶² This resulted in the Forty-Niners filing a lawsuit against Santa Clara County, which remained unsettled as of December 2012.¹⁶³

While there is no exact formula for determining the ratio of private to public stadium construction financing, recent projects have relied significantly, albeit not primarily, on private financial sources.¹⁶⁴ This means that NFL franchises are obtaining and con-

159. See Carolyn Schuk, *Stadium Agreement Cost Protections Already Paying Off for Santa Clara*, THE SANTA CLARA WEEKLY (Mar. 14, 2012), http://www.santaclara-weekly.com/2012/Issue-11/city_desk.html (stating that “it seems that the city’s elected officials and staff scored a public interest touchdown with a provision that the football team cover any stadium construction overruns (over \$878 million). This was one of the requirements of Measure J, the referendum approving stadium development.”).

160. See *id.* (indicating that provision requiring Forty-Niners to cover cost overruns quickly paid off because, “[t]he final stadium development budget and financing plan presented to the Santa Clara City Council/Stadium Authority (SA) . . . detailed \$29 million in additional construction costs, \$78 million for loan interest and fees, and \$50 million in contingency funds for unforeseen costs and technology upgrades”).

161. See Lauren Hepler, *49ers, Santa Clara Schools Back In Limbo Over \$30 Million In Public Funds*, SILICON VALLEY BUS. J. (Dec. 19, 2012, 11:01 AM), <http://www.bizjournals.com/sanjose/news/2012/12/19/exclusive-49ers-santa-clara-schools.html> (reporting that “[t]he new legal action by the 49ers continues a lawsuit first filed in June, when the county took issue with a voter-approved plan to allocate \$40 million in former redevelopment taxes to the team’s \$1.2 billion Santa Clara stadium project”).

162. See *id.* (reporting that Santa Clara County wished to take \$30 million in public funding originally included as part of Santa Clara’s contribution toward new stadium and reallocate it for use by Santa Clara public schools).

163. See *id.* (noting that as of December 19, 2012, “[t]he San Francisco 49ers and Santa Clara public schools will have to wait a little longer to learn whether they’ll actually get their agreed-upon share of more than \$30 million in public funds that has been in dispute for months”).

164. For a further discussion and analysis of recent NFL stadium projects, including average ratio of public versus private funding used to finance NFL stadiums from 1997-2011, see *supra* note 123 and accompanying text.

tributing at least a portion of the capital used for construction or renovation projects by securing financing through non-public or private sources.¹⁶⁵ For a team considering a G4 loan, an NFL team can only utilize the G4 loan program if the team itself makes a capital contribution toward the construction or renovations.¹⁶⁶ This may incentivize a team to contribute a portion of their own capital toward the construction or renovation of a stadium, especially if a team is located in a municipality that is unwilling or unable to provide enough public financing to satisfy a team's capital needs.¹⁶⁷

3. Other Sources of Private Funding

There are several other sources of private and quasi-private funding that can be employed in concert to provide stadium financing.¹⁶⁸ One financing option commonly used by NFL teams is personal seat licenses (PSLs).¹⁶⁹ When PSLs are used, fans essentially pay for the right to purchase season tickets for a specific seat in the stadium.¹⁷⁰ The PSL does not include a ticket to attend the game; the ticket must be purchased separately.¹⁷¹ The success of PSLs varies with the overall success and popularity of the corresponding NFL franchise.¹⁷² The resale market for PSLs indicates this varying

165. See Frey, *supra* note 21, at 264 (revealing that "a recent trend is [in stadium construction and renovation emphasizes] mixed financing . . . with a combination of public and private funding").

166. See 2011 Resolution G-4, *supra* note 139 (revealing that new G4 loan program provides for up to \$200 million loan for new stadium and up to \$250 million for stadium renovation to be repaid over fifteen years through premium seating revenue; additionally, G4 program requires NFL franchise to contribute toward cost of stadium construction or renovation).

167. See *id.* (noting that G4 program requires franchise to match G4 loan amount).

168. For a further discussion of examples of alternative sources of stadium financing by private and quasi-private sources, see *infra* notes 169-193 and accompanying text.

169. See Tom Barlow, *Sports Biz: Personal Seat Licenses are a License to Print Money*, DAILYFINANCE (May 17, 2009), <http://www.dailyfinance.com/2009/05/17/sports-biz-personal-seat-licenses-are-a-license-to-print-money/> (explaining that "[w]hen [someone] buy[s] a personal seat license (PSL) for a stadium or arena, [one] buy[s] the rights to a specific seat; say section 32, seat 3B. With this comes the right to buy the ticket for [one's] seat for any public event that is held there. If [the person] decline[s], the venue can still sell the ticket to someone else, and they don't have to share the money with [the PSL owner].").

170. See *id.* (providing that PSLs provide for sale of rights to select stadium seating).

171. See *id.* (explaining that if PSL owner "decide[s] to attend an event, [one must] still . . . pay for the ticket. The PSL simply gives [one] the option to buy the ticket before it is offered to the public.").

172. See *id.* (explaining that value of PSLs on secondary market varies markedly).

success; PSLs for teams such as the Dallas Cowboys and the Pittsburgh Steelers are advertised on resale websites, such as eBay, for tens of thousands of dollars.¹⁷³ In contrast, PSLs for teams such as the Cincinnati Bengals are being resold for only hundreds of dollars.¹⁷⁴

The sale of stadium naming rights is another source of revenue for NFL teams.¹⁷⁵ Recently, the New York Giants and the New York Jets, which share a stadium in East Rutherford, New Jersey, sold the naming rights to their new stadium to MetLife for approximately \$17 million per year for twenty-five years.¹⁷⁶ Although MetLife Stadium provides an example of an exceptionally lucrative naming rights deal, several stadiums around the league have similarly obtained significant revenue from stadium naming rights deals.¹⁷⁷ The downside of selling stadium naming rights is that it may take a while to find a buyer who meets or comes close to meeting the team's asking price.¹⁷⁸ For instance, Cowboys Stadium in Arling-

173. See *id.* (indicating that “[t]he resale market on PSLs is extremely volatile, and dependent largely on the success of the sports franchises that play in the venue. On eBay [in May 2009] you could buy eight Dallas Cowboy PSLs for \$160,000 or two for the Pittsburgh Steelers for \$60,000.”).

174. See *id.* (contrasting PSLs for Cowboys and Steelers with Cincinnati Bengals and observing that two PSLs for Bengals can be bought for under \$500).

175. See Frey, *supra* note 21, at 267 (recognizing that “[t]he sale of naming rights represents a major source of funding, as evidenced by the recent renaming of stadiums to Invesco Field, Pepsi Center, Heinz Field, and Busch Stadium”).

176. See Mike Ozanian, *Old Trafford's Naming Rights Could Fetch \$1 Billion For Manchester United's Shareholders*, FORBES (Aug. 11, 2012), <http://www.forbes.com/sites/mikeozanian/2012/08/11/old-traffords-naming-rights-could-fetch-1-billion-for-manchester-uniteds-shareholders/> [hereinafter Ozanian III] (reporting that several U.S. sports teams have sold naming rights to their stadiums, and that naming rights for MetLife stadium sold for approximately \$17 million per year for twenty-five years).

177. See Jaboner Jackson, *Stadium Geek Week: NFL Stadium Naming Rights*, FOOTBALLPHDS.COM (July 20, 2011), <http://www.footballphds.com/2011/07/20/stadium-geek-week-nfl-stadium-naming-rights/> [hereinafter Jackson III] (providing list of recent stadium naming rights deals and revenues). This article contains the following list of stadium naming rights deals:

Houston Texans, Reliant Stadium; \$300 million, 30 yrs.,
 Washington Redskins, FedEx Field; \$207 million, 27 yrs.,
 Arizona Cardinals, Univ. of Phoenix Stadium; \$154 million, 20 yrs.,
 Carolina Panthers, Bank of America Stadium; \$140 million, 20 yrs.,
 Philadelphia Eagles, Lincoln Financial Field; \$140 million, 20 yrs.,
 Indianapolis Colts, Lucas Oil Stadium; \$122 million, 20 yrs.,
 Denver Broncos, Invesco Field at Mile High; \$120 million, 20 yrs.,
 New England Patriots, Gillette Stadium; \$115 million, 15 yrs.,
 Baltimore Ravens, M&T Bank Stadium; \$75 million, 15 yrs.

See *id.* (listing specified stadium rights deals).

178. See Darren Heitner, *Why Jerry Jones Still Hasn't Sold Naming Rights to Cowboys Stadium*, FORBES.COM (Nov. 9, 2012), <http://www.forbes.com/sites/darrenheitner/2012/11/09/why-jerry-jones-still-hasnt-sold-naming-rights-to-cowboys-stadium/>

ton, Texas, had yet to sell the naming rights to its four-year-old stadium in 2012.¹⁷⁹

Furthermore, lottery funds may be used to finance a stadium project.¹⁸⁰ M&T Bank Stadium in Baltimore, Maryland utilized debt service paid by lottery proceeds.¹⁸¹ Proponents of this approach argue that lottery funds do not burden taxpayers because the purchase of lottery tickets is voluntary.¹⁸² Opponents express concern that this approach disproportionately places the burden of payment on economically disadvantaged individuals because they are more likely to purchase lottery tickets.¹⁸³ Moreover, the lottery approach may displace lottery revenue used for other public benefit programs and cause these other public benefit programs to lose revenue.¹⁸⁴

Similarly, a portion of state received income from casino revenue could be siphoned off and dedicated to stadium financing.¹⁸⁵ In early 2012, the Minnesota Vikings contemplated the use of funds generated from a “racino,” a racetrack with machine gambling facilities, to finance a portion of the cost to build a new stadium.¹⁸⁶

stadium/ (noting situation with Cowboys Stadium and explaining that “[a]t first thought, one may believe that [Jerry Jones, owner of Dallas Cowboys,] is throwing away money by not selling his stadium’s naming rights, but selling the naming rights to the wrong business could hurt the Cowboys’ revenue stream over time. While acquiring naming rights appears to be a fairly easy and straight forward process, the professional franchise must perform proper due diligence before selling the stadium’s naming rights to just any corporation. This is because partner corporations have either gone bankrupt in the past or have acquired a poor reputation in the public’s eyes.”).

179. See Mitchell Schnurman, *What’s In a Name for Cowboys Stadium*, DALLAS MORNING NEWS (Oct. 1, 2012), <http://www.dallasnews.com/business/columnists/mitchell-schnurman/20121001-whats-in-a-name-for-cowboys-stadium.ece> (reporting that as of October 2012, Dallas Cowboys had not sold naming rights to Cowboys Stadium, which could be worth \$15 to \$20 million per year).

180. See Goodman, *supra* note 73, at 196 (introducing use of lottery funds as financing option).

181. See *id.* (explaining that Baltimore Ravens used lottery funds to partially finance Ravens Stadium).

182. See *id.* (noting that taxpayer decision to purchase or not purchase lottery tickets is voluntary).

183. See *id.* (reasoning that “lower-income earners tend to spend more of their income on the lottery than do higher-income earners”).

184. See *id.* at 197 (explaining that strain will be placed on programs previously receiving lottery funds because money will be diverted from established funds when new stadium fund is created).

185. See Mike Kaszuba & Jim Ragsdale, *Racinos, St. Paul Add Stadium Drama*, STAR TRIBUNE (Minneapolis), Apr. 26, 2012, at B1, available at <http://www.startribune.com/politics/statelocal/148984435.html?refer=y> (reporting that proposal for new Minnesota Vikings stadium authorized use of “racinos” to generate funding).

186. See Briana Bierschbach, *Pulltabs’ Cash Lag No Problem, For Now*, POLITICS IN MINNESOTA (Dec. 21, 2012), <http://politicsinminnesota.com/2012/12/pulltabs->

While this is controversial, especially for a state that has not authorized slot machines at the state's horse racing tracks, it does show that NFL franchises and their housing municipalities are starting to devise increasingly creative solutions to obtain the necessary financing for stadium construction and renovation.¹⁸⁷

Fusion of various private funding sources provides another alternative.¹⁸⁸ In Green Bay, several financing strategies were used in conjunction, furthering the idea that utilizing several different sources of financing can generate a substantial amount of funding.¹⁸⁹ For example, the Green Bay Packers raised ticket prices by ten percent and sold personalized bricks outside of the stadium.¹⁹⁰ The bricks generated over \$1 million in the first year of sale alone.¹⁹¹ While Green Bay enjoyed exceptional success with these brick sales, other NFL franchises have sold comparable amounts of bricks in or around their stadiums.¹⁹² All sources of financing should be considered by a team looking to construct or renovate a stadium; like the personalized bricks utilized in Green Bay, each of these sources of financing should effectively be viewed as building blocks, the totality of which could provide an apt solution for a team and its housing municipality to fund stadium construction or renovations.¹⁹³

cash-lag-no-problem-for-now/ (reporting that in Minnesota, "the Gambling Control Board [pursued] a number of different avenues to increase revenue. . . . [T]he board approved new vendors of e-pulltabs and another electronic bingo game. Previously only one company had been authorized to sell the games. The board also gave the OK for bars at the Minneapolis St. Paul International Airport (MSP) to start using the games.").

187. See Kaszuba & Ragsdale, *supra* note 185 (reporting that legalizing "racino[s] has long been debated at the state Capitol, but has generally been opposed by DFLers and Indian tribes who operate casinos in Minnesota").

188. For a further discussion of other private sources used in conjunction, see *infra* notes 190-193 and accompanying text.

189. For a further discussion of strategies employed by Green Bay Packers to raise funding for stadium renovations through private sources, see *infra* notes 190-193 and accompanying text.

190. See Frey, *supra* note 21, at 276 (explaining that face value of all admission tickets were increased by 10 percent and personalized bricks and tiles were sold to be used around stadium).

191. See *id.* (noting that personalized bricks placed in and around Lambeau Field generated approximately \$1 million in first year alone).

192. See *id.* (explaining that while some cities had more success than others selling bricks, Detroit also enjoyed success with brick sales, selling only a couple thousand less bricks than Green Bay).

193. See *supra* notes 119-120 and accompanying text (explaining that every source of financing should be examined even if anticipated revenue stream from source will not finance entire stadium project in and of itself); see also *supra* notes 190-191 (indicating Green Bay Packers' success with novel idea that not only fostered fan support, but provided financing for stadium renovations as well).

C. Paying For the Bills

In the fall of 2012, it was evident that several issues needed to be addressed before the Bills and Erie County could reach a new lease agreement.¹⁹⁴ While there was some discussion as to the possibility of constructing a new stadium for the Bills in downtown Buffalo, this initiative did not gain much support from government officials who realized a new stadium would require a hefty investment of taxpayer funds.¹⁹⁵ Much of the discourse surrounding the new lease agreement centered on making the necessary renovations to Ralph Wilson Stadium within a budget of approximately \$200 million.¹⁹⁶ If the plan was to proceed with the proposed renovations to the stadium, the two parties needed to resolve what percentage of the investment in stadium renovations should be borne by public sources, the taxpayers of Erie County and New York State, and what percentage should be paid by private sources, such as the Bills' franchise, or the NFL through the G4 loan program.¹⁹⁷

1. Public Sources For Financing Improvements

Public financing is a major issue underlying the striking of a new lease agreement for the Buffalo Bills.¹⁹⁸ After the expiration of the Bills' first lease agreement in 1998, substantial renovations were

194. See Heaney, *supra* note 4 (listing several major issues that must be addressed before new agreement is reached between parties).

195. See James Fink, *Bills, Sabres Execs Talk Development*, BUFFALO BUSINESS FIRST (Aug. 16, 2012), <http://www.bizjournals.com/buffalo/news/2012/08/16/bills-sabres-execs-talk-development.html?page=all> (reporting that Bills' CEO Russ Brandon "said the Bills will take a 'very holistic' approach to whether the stadium should be renovated and, at what level and cost, or should it be replaced with a downtown Buffalo facility"); see also *Some Argue for New Stadium Instead of Renovations to Ralph Wilson Stadium*, DEMOCRAT AND CHRONICLE (Aug. 10, 2012), <http://www.democratandchronicle.com/article/20120810/SPORTS03/120810002/Some-argue-new-stadium-instead-renovations-Ralph-Wilson-Stadium> (revealing that while some people argue that building new stadium would be better option as opposed to renovations, Erie County Executive Mark Polocarz ruled this out due to concerns over "cost and space").

196. See Matt Rich Warren, *Buffalo Bills Stadium Renovations Expected To Top \$200 Million*, BUFFALO RUMBLINGS (Apr. 15, 2012), <http://www.buffalorumblings.com/2012/4/15/2949966/buffalo-bills-ralph-wilson-stadium-renovations> (stating that Bills' CEO Russ Brandon "put aside" idea to build new stadium based on "logistical concerns of cost" and Mr. Brandon focused attention on renovations to Ralph Wilson Stadium, which were expected to cost upwards of \$200 million).

197. See Heaney, *supra* note 4 (explaining that one major issue that must be addressed in reaching agreement is percentage allocation of stadium renovation costs).

198. See *id.* (introducing question of how much of cost for renovations to Ralph Wilson Stadium should be borne by New York State taxpayers); see also Gee, *supra* note 8 (explaining that Bills expect state and local government to contribute substantial amount of funding to pay for renovations to Ralph Wilson Stadium).

made to Ralph Wilson Stadium.¹⁹⁹ These renovations cost \$63 million, the entirety of which was provided by a state public subsidy.²⁰⁰ Under the stadium lease agreement executed in 1998, the Bills also received substantial public funding for stadium operating costs.²⁰¹ According to a local news source, the 1998 agreement provided for “more in operating subsidies (\$111 million) than in capital costs (\$101 million).”²⁰² With a strong history of providing large amounts of public funding to support to the Buffalo Bills, it may be expected that the new lease agreement will place a significant emphasis on funding stadium renovation through taxpayer money.²⁰³

There are several ways by which the Bills can generate revenue through public funding.²⁰⁴ First, it is expected that Erie County and New York State will directly subsidize a substantial portion of the stadium renovation cost with taxpayer funds.²⁰⁵ Issuing tax-free municipal bonds is the most likely way for Erie County and New York State to fund such a subsidy.²⁰⁶ Other public subsidy options include offering the stadium various forms of tax relief or tax ex-

199. See Matt Rich Warren, *Buffalo Bills Stadium Upgrades Could Be Partly Funded By Team, League*, BUFFALO RUMBLINGS (June 22, 2012), <http://www.buffalorumblings.com/2012/6/22/3110468/buffalo-bills-stadium-upgrades-lease-ralph-wilson> [hereinafter Warren II] (reporting that “[l]ocal and state government paid the entire \$63 million renovation price tag in 1998”).

200. See *id.* (noting that all \$63 million in renovations to Ralph Wilson Stadium were paid by public funding); see also Gaughan, *supra* note 26 (reporting that “the state will be asked to fund the public-sector share of the major renovations, as it did 15 years ago”).

201. See Heaney, *supra* note 4 (arguing that public currently pays for \$111 million of Bills’ operating costs over fifteen year term of lease).

202. See *id.* (revealing amounts of public subsidy Erie County and New York State currently provides to Bills for operating costs, first published in Buffalo News).

203. See Warren II, *supra* note 199 (reporting that renovations made to Ralph Wilson Stadium in 1998 were paid for entirely by state and local government); see also Heaney, *supra* note 4 (indicating amount of subsidy New York State and Erie County provide to Bills for operating costs); see also Gaughan, *supra* note 26 (reporting that Bills expect state and local governments to pay for most of required stadium renovations).

204. For a further discussion of the public sources of financing for NFL stadium renovation or construction, see *supra* notes 65-120 and accompanying text.

205. See Gee, *supra* note 10 (reporting that protection of taxpayer funds will be essential under new lease). Erie County and New York State are being asked to provide two to three times as much money required by stadium improvements almost fifteen years ago. See *id.* (recognizing that public is expected to subsidize anywhere from \$125 to \$190 million of expected \$200 to \$220 million cost for improvements).

206. See *supra* notes 71-74 and accompanying text (analyzing direct public subsidies in form of municipal bonds to pay for stadium construction or renovation).

emptions, such as waiving the sales tax on construction materials used for stadium improvements.²⁰⁷

Second, the Bills could reshape the way in which the public perceives public funding for stadium improvements.²⁰⁸ Inevitably some taxpayers will argue that they should not be obligated to subsidize a facility used ten times a year, especially when that facility is used by a profitable business that has the resources to pay for the renovations itself.²⁰⁹ One taxpayer went so far as to create a website dedicated to telling the taxpayers of western New York that subsidizing the Buffalo Bills and Ralph Wilson Stadium was a losing commitment for the western New York community.²¹⁰

To counteract this perception, the subsidy could be shaped in a way that uses the money that the Bills currently pay in New York State payroll taxes to finance the debt incurred from improvements.²¹¹ This is referred to as “payroll tax incremental financing” and it would require Erie County and New York State to originally issue debt in the form of municipal bonds to pay for the improvements and then use the payroll taxes paid by the Bills to service the debt.²¹² Over a fifteen-year lease term, \$150 million in improvements could be amortized by the Bills’ average payroll tax payments of \$13 million per year invested at 4 percent interest per year.²¹³ While this strategy effectively creates a payroll tax exemption for the Bills, some argue that if the Bills relocate, New York State would not receive any tax revenue from the Bills.²¹⁴ While this is still very

207. See *supra* notes 75-80 and accompanying text (noting indirect public subsidies utilized by other NFL franchises).

208. See Rocco Termini, *Another Voice: Creative Solution Could Solve Stadium Issue*, THE BUFFALO NEWS (Sept. 17, 2012), <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20120917/OPINION/120919406/1074> (explaining possible solution to financing stadium improvements that does not require immediate outlay of taxpayer funds).

209. See Heaney, *supra* note 4 (recognizing that “[t]hose who say the taxpayer shouldn’t subsidize a facility used 10 times a year—and by extension a profitable business worth hundreds of millions of dollars—have a valid point”).

210. See *Goodbye Buffalo Bills*, BYEBYEBUFFALOBILLS.COM, <http://www.byebyebuffalobills.com/> (last visited Sept. 10, 2012) (questioning whether government should be “in the business of entertaining its citizens as opposed to educating them, and providing other essential public programs and services that benefit area residents”).

211. See Termini, *supra* note 208 (suggesting solution to financing stadium without immediate outlay of taxpayer funds).

212. See *id.* (presenting payroll tax incremental financing and relating it to financing of renovations of Ralph Wilson Stadium).

213. See *id.* (explaining that “[o]ver the 15-year term of the lease, \$13 million a year in payments at 4 percent can amortize \$150 million in improvements”).

214. See *id.* (recognizing that relocation of Bills franchise would result in loss of money to state and local municipalities, and theorizing that “[i]f the Bills de-

much a public subsidy, framing the subsidy as a payroll tax may make it easier for the public to rationalize spending public funds to subsidize a privately owned and highly profitable business organization.²¹⁵

Although payroll tax incremental financing could be successful in western New York, other public financing options exist.²¹⁶ One possible solution would be to raise the sales tax rate in Erie County to help pay for the renovation costs.²¹⁷ However, the citizens of Erie County are not likely to support a higher sales tax.²¹⁸ Erie County taxpayers already pay the second highest sales tax rates in New York State at 8.75 percent, second only to New York City's sales tax rate of 8.875 percent.²¹⁹

Moreover, public ownership of the Bills franchise also fails to offer an appropriate solution.²²⁰ Public ownership would take several years to implement, and may be impossible because the NFL prohibits public ownership of NFL teams in its bylaws.²²¹ Such bylaws would have to be overturned either through NFL initiative or

cided that they wanted to leave, the penalty would be twice the investment in the improvements"). *But see* Neil deMause, *Buffalo Residents: No Tax Money for Stadium Buffalo Developer: Do We Have to Call It Tax Money?*, FIELD OF SCHEMES (Sept. 18, 2012), <http://www.fieldofschemes.com/2012/09/18/3800/buffalo-residents-no-tax-money-for-stadium-buffalo-developer-do-we-have-to-call-it-tax-money/> (arguing that "[t]ax increment financing projects (a.k.a. TIFs) have a long and sordid history in the U.S., particularly around sports facilities — the basic concept being that if the sports team weren't there, it wouldn't be paying any taxes to the state, so it should get its state taxes kicked back to pay for a new building").

215. For a discussion of an alternative way to frame a public subsidy, see *supra* notes 208-215 and accompanying text.

216. For a discussion of why other methods of public financing for improvements to Ralph Wilson Stadium are likely to be unsuccessful, see *infra* notes 218-213 and accompanying text.

217. For a further discussion and analysis of how a sales tax increase can be used to help finance stadium construction debt, see *supra* notes 85-96 and accompanying text.

218. *See Sales Tax Rates*, RAND NEW YORK SALES TAX STATISTICS, <http://ny.rand.org/stats/govtfin/salestax.html> (last visited Oct. 10, 2012) (indicating sales tax rate for counties in New York State).

219. *See id.* (indicating various sales tax rates of New York State municipalities, including Erie County).

220. For a further discussion and analysis of public ownership as an alternative to fund Ralph Wilson Stadium renovation, see *infra* note 221 and accompanying text.

221. *See Constitution and Bylaws of the National Football League*, NFL.COM, http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf (last visited Jan. 7, 2013) (specifying under section 3.2(A) that "[n]o corporation, association, partnership, or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership").

litigation, a process that would itself take several years.²²² The Bills and Erie County do not have several years to remain idle in their lease negotiations.²²³

Other public financing options may be used to generate funding for stadium renovations.²²⁴ Due to strained state and local budgets in New York State, it would be difficult for Erie County to reallocate funds from other public programs to help finance the renovation of Ralph Wilson Stadium.²²⁵ However, other options such as entertainment or sin taxes could provide the needed influx of capital to contribute to the renovations.²²⁶

The agreement struck between the Forty-Niners and the City of Santa Clara offers another alternative.²²⁷ As applied to the Bills, Erie County should seek a provision in the new lease agreement limiting the public's contribution toward stadium renovations to avoid construction overruns and encourage efficient planning and oversight of the stadium renovations.²²⁸ Although such language would not provide public financing in and of itself, it would effectively protect taxpayers from costly overruns.²²⁹

2. *Private Funding Through G4 Loan Program and Other Sources*

In August of 2012, political leaders of Erie County and New York State offered their support to help the Bills structure a new

222. For a discussion and analysis of the public ownership model as an alternative to provide funding for stadium construction or renovation, see *supra* notes 97-110 and accompanying text.

223. See Brian Frederick, *Fans List Demands for New NFL Labor Agreement*, THE HUFFINGTON POST (Mar. 6, 2012), http://www.huffingtonpost.com/brian-frederick/fans-list-of-demands-for-b_832050.html (recognizing NFL teams have been known to relocate overnight, specifically recalling incident in 1984 when Baltimore Colts relocated to Indianapolis overnight, noting that “[b]y the time the state had passed legislation to seize the Colts, there was nothing left to seize”).

224. See *supra* notes 111-117 and accompanying text (exploring other options of public financing available to NFL teams).

225. See *supra* notes 113-114 and accompanying text (examining redistribution of funds from other public programs but indicating tight budget in New York State in 2012).

226. See *supra* notes 115-116 and accompanying text (exploring sin and amusement taxes as source of public funding for stadium construction or renovation).

227. See Schuk, *supra* note 159 (discussing agreement entered into between City of Santa Clara and Forty-Niners capping public contribution for stadium construction).

228. See *id.* (recognizing that City of Santa Clara benefited from provision due to increase in estimated cost of stadium construction).

229. See *id.* (reporting that Forty-Niners and City of Santa Clara agreed to use substantial amount of public funds, \$878 million, to finance new stadium and noting that limiting provision protects Santa Clara from paying more for stadium than agreed upon).

lease agreement to encourage the Bills to stay in Buffalo.²³⁰ New York State Senator Charles Schumer held a conference on August 8, 2012 and revealed his plan to help the Bills, which emphasized making use of the NFL's G4 loan program.²³¹ The New York state senator proposed changes to the NFL's G4 loan program that would offer more favorable financing to the Bills if they decided to borrow a G4 loan from the NFL to cover a portion of the renovations to the stadium.²³² Under the current terms of the G4 loan agreement, if the Bills were to take out a loan from the NFL, the terms of the loan would force the team to pay back the loan upon the sale of the franchise.²³³ This sale would likely take place after Ralph Wilson, Jr. passes away and the team is sold.²³⁴

During the same week in August 2012, New York governor Andrew Cuomo hired Irwin Raji, an attorney who specializes in stadium development projects and lease negotiations in an effort to prevent the Bills from relocating and to ensure that taxpayer money is not squandered.²³⁵ Meanwhile, NFL Commissioner Roger Goodell offered his insight, recognizing that it is crucial to have a long-term lease that will address both short-term as well as long-term stadium issues and help ensure that the Bills are successful in Buffalo.²³⁶

Based on recent trends in NFL stadium renovation and construction projects, the Bills may be expected to contribute at least a

230. See Graham, *supra* note 56 (writing that NFL Commissioner Roger Goodell emphasized that "people want the Bills to stay [in Buffalo], a new stadium lease is 'a very high priority,' and the team will be sold after Ralph Wilson dies"); see also Gov. Appoints Expert to Advise, *supra* note 56 (stating that New York State Governor Andrew Cuomo and New York State Senator Charles Schumer offered their support to help keep Bills in Buffalo and facilitate lease negotiations between Bills and Erie County).

231. See Gov. Appoints Expert to Advise, *supra* note 56 (reporting that in August 2012, New York State Senator Charles Schumer sought changes to NFL loan program to find solution to keep Bills in Buffalo).

232. See *id.* (reporting that Senator Charles Schumer spoke with Roger Goodell on August 8, 2012, specifically requesting that some terms of NFL's G4 loan program be changed or waived for Bills so that Bills franchise could take advantage of G4 loan).

233. See *id.* (specifying that Senator Charles Schumer requested "'[the] due on sale' clause in the NFL's G4 loan program be waived for teams that have had the same owner for at least 20 years").

234. See *id.* (stating that "[the due on sale] clause requires owners to fully repay the loans if the team is sold").

235. See *id.* (reporting on New York State governor Andrew Cuomo's involvement in lease negotiations and his intention to help prevent Bills franchise from relocating).

236. See *id.* (reporting on NFL Commissioner Roger Goodell's involvement in lease negotiations and his emphasis on helping both parties reach short-term as well as long-term solution to stadium issues in Buffalo).

portion of the financing for stadium improvements.²³⁷ It can be shown that in recent years NFL teams have made at least some investment toward stadium improvements.²³⁸ Additionally, an investment by the Bills is necessary in order for the team to take advantage of the G4 loan for which Senator Schumer advocated.²³⁹ Thus, the Bills will most likely make some capital contribution toward the stadium renovation; the question becomes how much the franchise will contribute.²⁴⁰ It remains apparent that a feasible and fair financing solution for the renovations to Ralph Wilson Stadium will require all affected parties and constituencies to contribute in a meaningful way, including the Bills franchise itself.²⁴¹

Other solutions of funding which would supplement private sources include PSLs, stadium naming rights, lottery funds, and casino funds.²⁴² While it is speculative as to whether some of these measures would be successful in Buffalo, it is estimated that stadium naming rights could bring in \$4 million per year over a fifteen-year lease term.²⁴³ If the lease agreement provides that this revenue would be submitted to New York State in exchange for New York State bearing the upfront cost of stadium improvements, the stadium naming rights revenue stream of \$4 million per year would

237. See Gee, *supra* note 10 (reporting that protection of taxpayer funds will be essential under new lease). Erie County and New York State are being asked to provide two to three times as much money required by stadium improvements almost fifteen years ago, which would mean that the public is expected to subsidize anywhere from \$125 to \$190 million of expected \$200 to \$220 million cost for improvements. See *id.* (estimating State's commitment at "two to three times" previous \$63 million dollar earmark for renovations). The Bills organization or another private investor would likely pay the remainder of the cost. See *id.* (noting Bills' expectation of "somewhere between \$200 million and \$220 million in stadium improvements").

238. See *supra* notes 143-167 and accompanying text (providing analysis of contributions made by other NFL teams toward stadium construction or renovation projects).

239. See *supra* notes 166-167 and accompanying text (explaining requirements of NFL's G4 loan program); see also *supra* notes 231-234 and accompanying text (revealing New York State Senator Charles Schumer's plan to take advantage of NFL G4 loan).

240. See *supra* notes 143-167 and 237 and accompanying text (revealing circumstances indicating that Bills are expected to make some contribution toward renovation of Ralph Wilson Stadium).

241. See Gee, *supra* note 10 (explaining that Bills are expected to put forth at least portion of financing for stadium renovations and that to take advantage of G4 loan program, Bills must make some contribution).

242. See *supra* notes 168-193 and accompanying text (analyzing other sources of private financing and quasi-private financing, including PSLs, stadium naming rights, lottery funds, and casino funds).

243. See Termini, *supra* note 208 (explaining possible solution to financing stadium improvements that does not require taxpayer funds).

allow New York State to borrow \$45 million at four percent interest for fifteen years to immediately finance a substantial portion of stadium improvements.²⁴⁴

Conversely, PSLs are not likely to offer great success to stadium financing in Buffalo.²⁴⁵ PSLs are often very successful for NFL teams located in cities with big markets, but they are less successful for teams located in smaller markets, such as the Buffalo Bills.²⁴⁶ Other options such as lottery or casino funds are worth considering and could provide a necessary influx of capital to contribute to the renovations.²⁴⁷ Even options such as selling Buffalo Bills license plates or personalized bricks to be embedded in or around the stadium could be used to generate revenue.²⁴⁸ For a franchise like the Bills, no idea is too small or insignificant; every dollar worth of extra revenue is important.²⁴⁹

IV. NON-RELOCATION AGREEMENT AND REMEDIES AT LAW AND IN EQUITY

A. Non-Relocation Agreements and Other Protections Utilized by NFL Teams

A non-relocation agreement, including a penalty clause upon relocation of an NFL franchise, can be a powerful tool for a city or state to use to deter an NFL franchise from relocating.²⁵⁰ Houston, Texas felt the effects of a team relocating to another city in 1996 when the Houston Oilers relocated to Tennessee and became the

244. *See id.* (noting that “[t]he Bills are . . . one of the [few] clubs in the NFL that have not sold the naming rights to their stadium [T]he Bills can sell the naming rights for a minimum of \$4 million per year over the 15-year lease period. This revenue stream would allow the state to borrow \$45 million at 4 percent over 15 years.”).

245. *See supra* notes 169-174 and accompanying text (examining use of PSLs amongst NFL teams).

246. *See supra* notes 172-174 and accompanying text (explaining that PSLs are less effective when used in stadiums with small market teams); *see also supra* notes 57-58 and accompanying text (categorizing Buffalo Bills as small market team).

247. *See supra* notes 180-187 and accompanying text (examining lottery and casino funds as sources of financing for stadium construction or renovation).

248. *See supra* notes 190-192 and accompanying text (examining personalized brick sales as sources of financing for stadium construction or renovation).

249. *See Frey, supra* note 21, at 276 (explaining that sources of funding that may seem insignificant are worth exploring).

250. *See Non-Relocation Agreement By and Between Harris County Sports & Convention Corporation, and Houston NFL Holdings, L.P.*, HARRIS CNTY.-HOUSTON SPORTS AUTH., http://www.houstonsports.org/downloads/1358605841.04093500_9f86793a61/non_relocation_agreement_02.pdf (last visited Jan. 19, 2013) [hereinafter *Houston Non-Relocation Agreement*] (proving non-relocation agreement [“Agreement”] for Houston Texans).

Tennessee Titans.²⁵¹ In 1999, Houston acquired an expansion team, the Houston Texans (the “Texans”).²⁵² In 2001, the Texans entered into a non-relocation agreement (the “Agreement”) with a government corporation formed to represent the City of Houston (“Houston”), which was intended to deter subsequent relocation of the Texans.²⁵³

The Agreement provided that the Texans were required to play all of their home games “in the local area” and “in the Stadium throughout the lease term.”²⁵⁴ The exception to this general provision was that one game per season could be played outside of the area.²⁵⁵ The Agreement also provided exceptions for special circumstances such as untenability of the stadium and obligations during an NFL Labor Dispute.²⁵⁶

Because Houston lost an NFL franchise due to relocation once before, it is no surprise that the Agreement specifically contemplated relocation.²⁵⁷ It provided that the Texans “shall not relocate the Club or the Home Territory of the Club outside the boundaries of the Local Area.”²⁵⁸ It further prohibited the Texans from seeking approval from the NFL to relocate, except during the last five years of the lease term.²⁵⁹ If the team were to entertain relocation

251. See *Houston Oilers Historical Moments*, SPORTS E-CYCLOPEDIA, <http://www.sportsecyclopedia.com/nfl/tenhou/houoilers.html> (last visited Oct. 9, 2012) (explaining that in 1996, Houston Oilers ended their lease with city of Houston one year early and moved to Tennessee).

252. See *Texans Team History*, HOUSTON TEXANS, <http://www.houstontexans.com/team/history.html> (last visited Mar. 6, 2013) (noting that on October 6, 1999, “[t]he National Football League owners vote[d] 29-0 to award the 32nd NFL franchise to Houston and Bob McNair for a record amount of \$700 million”).

253. See *Houston Non-Relocation Agreement*, *supra* note 250 (stating that non-relocation Agreement was entered into in May 2001 between local government, through government corporation [“Houston”], and Houston Texans franchise [the “Texans”]).

254. See *id.*, Article 2 §§ 2.1 and 2.2.1 (committing Texans franchise to play in local area and covenanting Texans to play in stadium).

255. See *id.* (indicating up to one Texans home football game may be played outside of home stadium and local area, provided it is not playoff game).

256. See *id.* (discussing circumstances under which Texans would not be required to play in home stadium, including untenability of stadium, casualty not caused by gross negligence or willful misconduct of Texans or its agents or employees, event of force majeure, landlord failure, landlord default, or during NFL labor disputes).

257. See *id.*, art. 3 (discussing terms in Agreement restricting relocation of franchise).

258. See *id.*, art. 3 § 3.1(a) (stating that Texans “shall not relocate the Club or the Home Territory of the Club outside the boundaries of the Local Area”).

259. See *id.*, art. 3 § 3.2 (providing that “except during last five (5) years of the Lease Term,” Texans “shall not apply for or seek approval from the National Football League for the relocation of the Club or the Home Territory of the Club outside the Local Area or for the reduction of the Local Area”).

offers during the last five years of the Agreement, the Agreement makes it clear that the team must provide written notice to Houston.²⁶⁰ Additionally, the Texans cannot relocate before the expiration of the current lease term.²⁶¹

In the event of a default by the Texans, the Agreement included specific remedies.²⁶² In particular, Houston could seek and obtain injunctive or declaratory relief including specific performance, recover liquidated damages, terminate the Agreement, and utilize any other remedy available at law or in equity.²⁶³ Especially noteworthy was the availability of specific performance as a remedy.²⁶⁴ The Agreement recognized that Houston constructed the stadium, incurred debt, and levied taxes to that end, and rationalized that monetary damages would be too indeterminate to compensate Houston for any breach.²⁶⁵ It should be noted, however, that this type of specific performance is subject to state and local laws, and such specific performance must take several factors into consideration, including public policy and practicability.²⁶⁶

The Agreement also contemplated liquidated damages.²⁶⁷ Although the Agreement stated that there were “financial, civic, and social benefits” from the Texans playing football in Houston, these benefits were “difficult to quantify” precisely.²⁶⁸ However, the Agreement stipulated a list of breach dates and corresponding sums

260. *See id.*, art. 3 § 3.3 (providing that Texans must provide written notice of negotiations or agreements with third parties concerning relocation).

261. *See id.* (stating relocation may not occur before expiration of current lease term).

262. *See id.*, art. 4 (explaining remedies available to non-breaching party).

263. *See id.*, art. 4 § 4.2 (providing remedies to Houston in event of breach by Texans).

264. *See id.* (providing specific performance as possible remedy to non-breaching party).

265. *See id.*, art. 4 § 4.3 (stating either party may seek injunctive relief and recognizing that Houston incurred taxes and debt to “permit playing of Football Home Games in the Stadium” and “damages could not be calculated to compensate [Houston] . . . for any breach by [Texans] of the covenants and agreements contained in [the] Non-Relocation Agreement”).

266. *See id.* (providing exceptions to equitable relief of specific performance).

267. *See id.*, art. 4 § 4.4 (contemplating liquidated damages and providing schedule of “reasonable estimated damages” not to be construed as penalty).

268. *See id.* (providing that “[p]arties also recognize, agree, and stipulate that the financial, civic, and social benefits to HCSCC, the Sports Authority, the City, and the County from the presence of the Club and the playing of its Football Home Games in the Local Area are great, but that the precise value of those benefits is difficult to quantify due to the number of citizens and businesses that rely upon and benefit from the presence of the Club in the City and County”).

of reasonable liquidated damages.²⁶⁹ For instance, the Agreement provided for \$200 million in liquidated damages for a breach of contract during the first five years of the Agreement and the damages reduce to \$60 million if a breach occurred after July 1, 2023.²⁷⁰

In the event that the Texans sell the franchise, the Agreement considered assignment of the non-relocation clauses to the assignee.²⁷¹ The agreement stated that the assignee becomes responsible for the performance of all of the obligations agreed to by the Texans under the Agreement.²⁷² While the Agreement envisioned many other assignment and transfer scenarios, it makes it clear that the Texans may not sell the team to relocate the franchise without being in breach of the agreement.²⁷³

The City of Santa Clara ("Santa Clara") recently executed a non-relocation agreement with the San Francisco Forty-Niners prior to starting construction on a new stadium.²⁷⁴ This agreement included provisions comparable to the provisions set forth in the

269. *See id.* (providing dates and amounts for liquidated damages after breach of contract by Texans).

7/1/98-6/30/2003, \$200,000,000;

7/1/03-6/30/2008, \$172,000,000;

7/1/08-6/30/2013, \$144,000,000;

7/1/13-6/30/2018, \$116,000,000;

7/1/18-6/30/2023, \$80,000,000;

After 7/1/2023, \$60,000,000.

Id. (scheduling liquidated damages for breach of contract by Texans).

270. *See id.* (noting that breach of contract between June 1, 1998 and May 30, 2003 would result in \$200 million in liquidated damages and breach between after June 1, 2023 would result in \$60 million in liquidated damages).

271. *See id.*, Article 5 § 5.1(b) (stating that "[A]ssignee assumes full responsibility for the performance of all of the obligations of [Texans] under this [agreement] arising on and after the date of assignment").

272. *See id.* (detailing that "such assignee of the Franchise executes and delivers to HCSCC Assignment and Assumption Agreement whereby such assignee assumes full responsibility for the performance of all of the obligations of Houston NFL Holdings under this Non-Relocation Agreement arising on and after the date of such assignment. The form of such instrument of assumption shall be subject to the prior written approval of HCSCC, which approval shall not be unreasonably withheld, delayed or conditioned, and shall be limited to the question of whether such instrument, when duly executed, will accomplish its intended purpose under this Non-Relocation Agreement.").

273. *See generally id.*, Article 5 (providing permitted transfers, assignments, release from obligations, and other contemplated assignments).

274. *See Santa Clara Non-Relocation Agreement*, CITY OF SANTA CLARA, <http://santaclaraca.gov/modules/ShowDocument.aspx?documentid=7039> (last visited Oct. 31, 2012) (containing non-relocation agreement executed between Santa Clara and Forty-Niners dated March 11, 2012); *see also* Katie Linendoll, *49ers' New Stadium Aims to Be Smartest*, ESPN (Oct. 29, 2012, 1:37 PM), http://espn.go.com/blog/playbook/tech/post/_/id/2757/49ers-new-stadium-aims-to-be-smartest (reporting that new stadium for San Francisco Forty-Niners is scheduled to open in 2014).

Houston non-relocation agreement.²⁷⁵ However, the default and remedies section in the Santa Clara agreement contemplated specific performance more fully than the Houston agreement.²⁷⁶ The Santa Clara agreement emphasized the possibility of specific performance, injunctive relief, and other equitable remedies to be used against the Forty-Niners in the event that the Forty-Niners breached the agreement, by describing these remedies as a “bargained-for expectation” of the agreement.²⁷⁷ Additionally, the liquidated damages provision was more ambitious than the provision in the Houston agreement.²⁷⁸ Instead of scheduling specific amounts of damages to be sought in the event of a breach of contract, the Santa Clara agreement provided that the Forty-Niners are liable for “the outstanding principal, plus accrued interest, fees and expenses on the Construction/Takeout Loan on the date of payment.”²⁷⁹ This language more effectively seeks to recover the Santa Clara taxpayers’ investment in the new stadium by attempting to

275. *Compare Santa Clara Non-Relocation Agreement*, *supra* note 274, §§ 2-5 (containing Santa Clara Non-Relocation Agreement, including covenant to play at new stadium for specified term subject to several terms and conditions and providing remedies for default), *with Houston Non-Relocation Agreement*, *supra* note 250, §§ 2-5 (containing Houston Non-Relocation Agreement, including covenant to play at new stadium for specified term subject to several terms and conditions and providing remedies for default).

276. *See Santa Clara Non-Relocation Agreement*, *supra* note 274, § 5.1(b) (“[T]he specific performance of the Non-Relocation Covenants is a bargained-for expectation of the [City of Santa Clara] [I]n the event of a Non-Relocation Default, the [City of Santa Clara] shall be entitled as a form of relief to a judicial order and judgment directing [the Forty-Niners] to specifically perform its obligations under the Non-Relocation Covenants and enjoining it from failing to perform its obligations under the Non-Relocation Covenants or acting in a manner that would constitute a Non-Relocation Default.”).

277. *See id.* § 5.1(c) (“[I]n the event of a Non-Relocation Default, the [City of Santa Clara] shall . . . be entitled to seek and obtain . . . temporary, preliminary and permanent injunctive and other equitable relief restraining, enjoining and prohibiting any such Non-Relocation Default, and directing the specific performance of the terms of the Non-Relocation Covenants”).

278. *Compare id.* § 5.2(b) (“[The] team shall be liable for, and the Stadium Authority shall have the right to recover from Team, liquidated damages in an amount equal to the amount, if any, of the outstanding principal, plus accrued interest, fees and expenses on the Construction/Takeout Loan on the date of payment”), *with Houston Non-Relocation Agreement*, *supra* note 250, Article 4 §4.4 (providing liquidated damages schedule that may or may not cover Houston’s investment in stadium constructed for Texans).

279. *Santa Clara Non-Relocation Agreement*, *supra* note 274, § 5.2(b) (“[T]eam shall be liable for, and the Stadium Authority shall have the right to recover from Team, liquidated damages in an amount equal to the amount, if any, of the outstanding principal, plus accrued interest, fees and expenses on the Construction/Takeout Loan on the date of payment. . . .”).

ensure that the City of Santa Clara is not left with *any* debt from building a new stadium in the event of a Forty-Niners breach.²⁸⁰

Other NFL teams have entered agreements similar to the non-relocation agreements utilized in Houston and Santa Clara.²⁸¹ In the fall of 2011, the Jacksonville Jaguars executed a lease agreement which included provisions stating that the Jaguars may breach the lease agreement without fault only if the stadium is improperly maintained or if the team loses money in three consecutive years.²⁸² This allowed Jacksonville to protect against franchise relocation because Jacksonville deemed neither of those possibilities as likely to arise.²⁸³

Additionally, the NFL bylaws provide an added layer of protection from franchise relocation.²⁸⁴ Article 4.3 of the NFL bylaws states that a franchise may relocate if it is no longer financially viable and the NFL and the franchise cannot work together to find an adequate solution.²⁸⁵ If there is no financial viability and the sides cannot reach a solution, the NFL must then consider several factors in determining whether to allow a team to relocate.²⁸⁶ Further-

280. See generally *id.* (providing comprehensive terms of liquidated damages provision); see also Brian Shields, *Santa Clara Council Approves Niners Stadium Contract*, KRON4 (Feb. 15, 2012), <http://www.kron4.com/Article.aspx?ArticleID=3111> (providing that Santa Clara legislature approved contract to build new Forty-Niners stadium at a cost of \$878 million).

281. See Jaboner Jackson, *NFL In LA: Jacksonville Jaguars Not Coming to Farmers Field In Los Angeles*, FOOTBALLPHDS.COM (Nov. 30, 2011), <http://www.footballphds.com/2011/11/30/nfl-in-la-jacksonville-jaguars-not-coming-to-farmers-field-in-los-angeles-2/> [hereinafter Jackson IV] (reporting that Jacksonville Jaguars have “iron-clad” agreement in place).

282. See *id.* (noting that Jacksonville “Jaguars can only break their lease without fault if a judge determines that the City of Jacksonville has not properly maintained the stadium or if the judge determines that the team has lost money for three consecutive seasons. And neither has been the case for the Jaguars.”).

283. See *id.* (noting that it was not likely for City of Jacksonville to neglect stadium upkeep and it was not likely that Jaguars franchise would experience three consecutive years of fiscal losses).

284. See *id.* (stating “the NFL has clear policies and procedures in place for relocation” and describing factors NFL considers prior to relocation of franchise).

285. See *id.* (“[According to] Article 4.3 of the NFL Constitution and Bylaws, a franchise can relocate if a club’s viability in its current city and stadium cannot be solved by the franchise and NFL working in conjunction.”).

286. See *id.* (revealing twelve factors NFL considers when determining whether to approve or deny NFL franchise relocation). The factors are listed as follows:

- (1) The team’s service to its current city and stadium;
- (2) Fan loyalty;
- (3) Stadium adequacy;
- (4) Public financial support of the team by the city and taxpayers;
- (5) Team’s financial performance;
- (6) Whether there is already a team in the relocation city;
- (7) Team’s attempt to address stadium situations in its current city;

more, Article 4.3 “requires prior approval by the affirmative vote of three-fourths of the member clubs before a club may transfer its franchise or playing site to a different city either within or outside its existing home territory.”²⁸⁷ While these league considerations may provide some reassurance to a fan or city concerned with spontaneous team relocation, a hosting municipality should not rely exclusively upon these NFL procedural relocation provisions to protect against relocation; municipalities should provide themselves with as much protection against relocation as possible and specifically contract for non-relocation covenants and rights in the event of a breach in order to adequately protect taxpayer interests.²⁸⁸

B. Safeguarding the Bills and Taxpayers Through Lease Agreement

If the Bills and Erie County and New York State were intent on keeping the Bills franchise in western New York, it would benefit the state and local municipalities to add terms or provisions to the new lease agreement designed to discourage the franchise from leaving Buffalo.²⁸⁹

Similar to the non-relocation agreement executed in Houston and Santa Clara, one option is to add a non-relocation provision to the Bills’ new lease agreement or to create a separate non-reloca-

(8) Degree to which the team may have contributed to stadium problems;

(9) Relocation demographics;

(10) Effect of relocation on current television contracts and labor agreements;

(11) Effect of relocation on anticipated television contracts, particularly as related to media market size;

(12) Effect of relocation on NFL division alignments, rivalries, travel requirements, etc.

See id. (providing specific factors considered by NFL before franchise is allowed to relocate); *see also Policy and Procedures for Proposed Franchise Relocations*, MINN. STATE LEGISLATURE, <http://www.leg.state.mn.us/webcontent/lrl/issues/FootballStadium/NFLFranchiseRelocationRules.pdf> (last visited Oct. 9, 2012) (discussing more fully requirements under Section 4.3 of NFL bylaws).

287. *Policy and Procedures for Proposed Franchise Relocations*, *supra* note 286, § 3 (discussing factors that may be considered in evaluating proposed franchise relocation).

288. *See supra* notes 250-283 and accompanying text (examining measures that other NFL teams have taken to deter franchise relocation).

289. *See generally supra* notes 250-283 and accompanying text (exploring methods that other NFL teams have employed to preempt relocation issues).

tion agreement to supplement the new lease agreement.²⁹⁰ Using the Santa Clara non-relocation agreement as a guide, the Bills' lease agreement could include terms providing for equitable remedies in addition to remedies at law for a breach of the agreement.²⁹¹ To bolster the claim for equitable remedies for a breach, Erie County should seek to include a provision stating that the parties specifically contemplated these remedies because, although the loss to Erie County from relocation would be significant, prospective losses are difficult to quantify with precision when such an agreement is drafted.²⁹² Further, Erie County should require the Bills to provide written notice to Erie County prior to entertaining offers from buyers seeking to relocate the franchise.²⁹³ Such a provision would encourage full disclosure and fair dealing between the two parties and promote a cooperative and transparent environment for future negotiations and counter offers.²⁹⁴

Additionally, the agreement should contemplate the assignment of the non-relocation clauses to any third party assignee that succeeds Mr. Wilson in ownership.²⁹⁵ Change in ownership is imminent for the Bills and, similar to the Houston agreement, Erie County should seek to include a provision stating that the assignee assumes full responsibility for the performance of all obligations that arise under the non-relocation provisions of the agreement.²⁹⁶ Such language will make it clear to the third party purchaser of the Bills franchise that relocation of the franchise was specifically contemplated to be in breach of the agreement.²⁹⁷

At a minimum, Erie County needs to protect any investment it makes if and when it ultimately uses public funding to renovate

290. See *supra* notes 250-273 and accompanying text (examining Houston non-relocation agreement); see also *supra* notes 274-280 and accompanying text (examining Santa Clara non-relocation agreement).

291. See *supra* notes 263-266 and accompanying text (examining equitable remedies included in Houston non-relocation agreement).

292. See *supra* notes 263-266 and accompanying text (analyzing language use in Houston non-relocation agreement to protect Houston's right to seek equitable relief in event of breach).

293. See *Houston Non-Relocation Agreement*, *supra* note 250, Article 3 § 3.3 (noting that Houston's non-relocation agreement provides that notice must be given to hosting municipality before team contemplates offers from other municipalities).

294. See *generally id.* (providing that notice has inherent effect of promoting honest communication between contracting parties).

295. See *id.*, art. 5 § 5.1(b) (introducing provision contemplating assignment of agreement to third party assignee).

296. See *id.* (examining language used in Houston non-relocation agreement to transfer obligations under agreement to assignee).

297. See *generally id.*, Article 5 (explaining purpose of contemplating assignment of agreement to third party assignee).

Ralph Wilson Stadium.²⁹⁸ The Bills and Erie County should place great emphasis on the negotiation of a liquidated damages provision.²⁹⁹ A liquidated damages provision contemplates a fixed amount of money a breaching party promises to pay the non-breaching party in the event of a breach of the agreement.³⁰⁰ The liquidated damages schedule in the new lease agreement with the Bills should be drastically higher than the damages schedule provided by the 1998 lease agreement, especially if its purpose is to deter relocation of the Bills franchise.³⁰¹ The 1998 lease agreement attached an early termination fee of \$20 million for termination of the lease in the first six years of the agreement and the fee decreases to \$2 million for a termination in year fourteen.³⁰² Speculators anticipate that the Bills will be asked to guarantee \$50 to \$100 million as an early termination fee in the event that the Bills relocate before the next lease agreement expires.³⁰³

Alternatively, Erie County could seek to include a provision requiring the Bills to pay the outstanding principal, plus accrued interest, fees and expenses on the stadium renovations loan.³⁰⁴ This is consistent with the provisions included in the Santa Clara non-

298. See Gee, *supra* note 10 (reporting that taxpayers need to be protected if Bills franchise were to relocate – observers of Bills lease negotiations expect figures of \$50 to \$100 million as liquidated damages fee).

299. See Heaney, *supra* note 4 (recognizing that parties must consider guarantees and/or penalties in place for when Ralph Wilson, Jr. dies).

300. See BLACK'S LAW DICTIONARY (9th ed. 2009) (“[A liquidated damages clause is a] contractual provision that determines in advance the measure of damages if a party breaches the agreement. Traditionally, courts have upheld such a clause unless the agreed-on sum is deemed a penalty for one of the following reasons: (1) the sum grossly exceeds the probable damages on breach, (2) the same sum is made payable for any variety of different breaches (some major, some minor), or (3) a mere delay in payment has been listed among the events of default.”).

301. See *id.* (discussing liquidated damages clauses); see also *Buffalo Bills Draft Lease Agreements*, Exhibit G, ERIE CNTY. WORKS, <http://www.erie.gov/billslease/> (last visited Sept. 8, 2012) (providing liquidated damages schedule, referenced in agreement as “early termination fee schedule,” in Bills’ 1998 lease agreement with Erie County).

302. See *Buffalo Bills Draft Lease Agreements*, *supra* note 301, Exhibit G (setting forth liquidated damages schedule in Bills’ 1998 lease agreement with Erie County).

303. See Gee, *supra* note 10 (suggesting need for taxpayer protection if Bills franchise were to relocate – observers of Bills lease negotiations expect \$50 to \$100 million as liquidated damages fee).

304. See *Santa Clara Non-Relocation Agreement*, *supra* note 274, § 5.2(b) (revealing provision employed by Santa Clara to ensure municipality is fully reimbursed for outstanding debt incurred through financing new stadium in event of franchise relocation).

relocation agreement and the Jacksonville lease agreement.³⁰⁵ In sum, such a provision would allow Erie County to utilize a provision asking the Bills to buy out the remainder of their lease by paying the County what they still owe in the event of relocation before the end of the lease term.³⁰⁶

As explored in the prior section, the NFL's bylaws set forth a procedure by which the NFL can permit or deny a team's request to relocate the franchise.³⁰⁷ An examination under Section 4.3 of the NFL bylaws of the Bills' current situation reveals mixed results.³⁰⁸ Although the NFL considers at least twelve factors in determining whether to allow a team to relocate, several of these factors are especially relevant to the Bills' current situation.³⁰⁹

For instance, the NFL would likely cite Buffalo Bills fan loyalty, Erie County's history of providing public financial support to the Bills, the Bills' financial performance, and the effect of the Bills' relocation on NFL division alignments as significant factors against allowing the Bills to relocate.³¹⁰ While it is true that the Buffalo Bills do not sell out every home game, as indicated by the fact that there were three "blacked-out" games during the 2010 and 2011 Bills seasons, the Bills still maintain a strong fan base, especially for a team that has not played a playoff game since 1999.³¹¹ Other in-

305. See *id.* (explaining provision used in Santa Clara Non-Relocation Agreement stating that Santa Clara would be fully compensated for outstanding debt incurred through financing new stadium in event of franchise relocation); see also Gee, *supra* note 10 (noting that "Jacksonville allows the Jaguars to buy out their lease by paying off what they still would owe – estimated to be more than \$100 million – or showing that they are losing money").

306. See *supra* notes 304-305 and accompanying text (summarizing purpose of including provision as fully compensating Erie County for outstanding debt incurred through financing stadium renovations in event of franchise relocation).

307. See *supra* notes 284-288 and accompanying text (outlining NFL procedure employed before NFL grants relocation, specifically examining Article 4.3 of NFL bylaws).

308. For a further discussion of the Bills relocation analysis under Section 4.3, see *infra* notes 309-319 and accompanying text.

309. See *supra* notes 284-288 and accompanying text (outlining NFL procedure employed before NFL grants relocation, specifically examining Article 4.3 of NFL bylaws).

310. For a further discussion of the factors disfavoring Bills franchise relocation under Article 4.3 of the NFL Bylaws, see *infra* notes 311-314 and accompanying text; see also *supra* note 286 and accompanying text (listing twelve factors NFL considers before allowing football franchises to relocate).

311. See *Buffalo Bills*, FORBES, <http://www.forbes.com/teams/buffalo-bills/> (last visited Oct. 9, 2012) (indicating that there were three blacked-out games in 2010 and 2011 Bills seasons); see also Stephen Watson, *Blackout Gives Bills Fans Few Alternatives*, THE BUFFALO NEWS, Dec. 1, 2012, at A1, available at <http://www.buffalo-news.com/apps/pbcs.dll/article?AID=/20121201/CITYANDREGION/121209912> (explaining term "blacked-out" refers to NFL games where tickets do not sell out).

dications of a strong fan base in Buffalo include an analysis compiled by Forbes ranking Bills fans as the third most valuable on a per capita basis in the NFL.³¹² Although unofficial and highly speculative, in 2012 the Bleacher Report ranked the Buffalo Bills fan base as first among the ten most loyal in New York.³¹³ Additionally, Erie County has a strong history of supporting the Bills franchise, from funding Ralph Wilson Stadium's previous renovations in their entirety to subsidizing the Bills' operating costs, the taxpayers of Erie County have demonstrated substantial public support for the Bills.³¹⁴

The Bills' current financial position is also quite strong, indicating the franchise's sustainability as a viable business entity in western New York.³¹⁵ In 2011, the Bills earned \$240 million in net stadium revenues, which the team used for debt payment.³¹⁶ In the same year, the team's earnings before interest, taxes, depreciation, and amortization were \$29.4 million.³¹⁷ This operating income was higher than fourteen other NFL teams, which indicates that the team's financial position remains viable.³¹⁸ Lastly, moving the Bills

and local fans are unable to watch local game on TV); *see also* Tim Graham, *Bills Fans Rank Third in Dollar Value to Team*, THE BUFFALO NEWS (Sept. 5, 2012), <http://blogs.buffalonews.com/press-coverage/2012/09/bills-fans-rank-third-in-dollar-value-to-team.html> (indicating Bills have strong fan base evidenced by fact that Forbes ranks Bills fans as third most valuable on per capita basis, dividing each team's local revenue by local metro population); *see also* Matt Warren, *2011 Buffalo Bills: Playoff Drought Drags On*, BUFFALO RUMBLINGS (Jan. 11, 2012), <http://www.buffalorumbblings.com/2012/1/11/2697481/buffalo-bills-playoff-drought> [hereinafter Warren III] (explaining that Bills haven't made playoffs "since 1999, when their season ended against the Titans in Tennessee during the wild card round. Since then, Buffalo has had a winning record only once.").

312. *See* Graham, *supra* note 311 (reporting that Forbes ranks Bills fans as third most valuable on per capita basis, by dividing each team's local revenue by local metro population).

313. *See* Amber Lee, *The 10 Most Loyal Sports Fans in NY*, BLEACHER REPORT (June 4, 2012), <http://bleacherreport.com/articles/1201126-the-10-most-loyal-sports-fans-in-ny/page/11> (ranking Buffalo Bills as most loyal fans in New York).

314. *See* Warren II, *supra* note 199 (indicating that in 1998, local and state government paid entire amount of renovation costs for Ralph Wilson Stadium); *see also* Heaney, *supra* note 4 (reporting that under current lease agreement, Erie County subsidizes Bills operating expenses by providing operating subsidies of approximately \$111 million over fifteen years).

315. For a detailed examination of Bills' financial viability, *see infra* notes 316-319 and accompanying text.

316. *See* Ozanian II, *supra* note 149 (ranking Bills twenty-ninth most valuable team out of thirty-two teams). *See Buffalo Bills*, *supra* note 311 (indicating that Bills net stadium revenues for 2011 was \$240 million).

317. *See Buffalo Bills*, *supra* note 311 (noting Bills EBITDA for 2011 was \$29.4 million).

318. *See* Ozanian II, *supra* note 149 (indicating that Bills had higher operating income than fourteen other NFL teams for 2011).

franchise to a city such as Los Angeles would severely disrupt the AFC East and conference rivalries, and would also likely cause several division realignments.³¹⁹

Currently, the most significant factors that the NFL would cite in support of a potential Bills franchise relocation decision would include stadium inadequacy and the Bills' failed attempts to address stadium situations in its current city.³²⁰ An inadequate stadium serves as the Bills' biggest Achilles heel, not only in terms of stadium lease negotiations but also in terms of the overall viability of the Bills franchise in western New York.³²¹ A novel and creative solution to the Bills' stadium concerns could keep the Bills in Buffalo for decades to come; an inept and disingenuous solution could cause the Bills to pack their bags and head for greener pastures.³²²

V. CONCLUSION

Whether a team seeks to finance a new or renovated stadium, or a hosting municipality seeks to protect against franchise relocation, stadium financing and lease negotiation issues resonate on some level with every NFL team and NFL hosting municipality.³²³ While this comment specifically examined the financing and contracting options available to the Buffalo Bills, it should be noted that every NFL team and hosting municipality can achieve a meaningful and long-term stadium lease by exploring a variety of stadium financing options and recognizing the parties' underlying interests and concerns.³²⁴

As the Buffalo Bills and Erie County prepare to make renovations to Ralph Wilson Stadium, several financing options remain

319. See *supra* note 286 and accompanying text (noting that NFL considers effect of relocation on NFL division alignments, rivalries, travel requirements, etc.).

320. See *supra* notes 8-10 and accompanying text (discussing Ralph Wilson Stadium's need for stadium renovations and role of parties in achieving new lease agreement).

321. See *supra* notes 8-10 and accompanying text (providing two major issues keeping Bills and Erie County from reaching new lease agreement).

322. See *supra* notes 8-10 and accompanying text (noting importance of finding efficient and effective solutions to major issues that face parties before new lease agreement is achieved).

323. See *supra* notes 143-167 and accompanying text (providing analysis of financing arrangements made by other NFL teams to undergo stadium construction or renovation projects); see also *supra* notes 250-283 and accompanying text (examining measures NFL teams have taken to deter franchise relocation).

324. See generally *supra* notes 250-283 and accompanying text (examining measures NFL teams have taken to deter franchise relocation and identifying concerns that hosting municipalities have addressed through non-relocation agreements and similar contracts).

available.³²⁵ While a majority of the funding for such renovations will likely come from public sources, collaboration between the Buffalo Bills franchise and the New York state and local government is necessary to provide the required stadium renovations.³²⁶ In reaching a new lease agreement, New York State and Erie County must acknowledge their duty to protect the taxpayers from a significant loss on investment if renovations are made to Ralph Wilson Stadium and the franchise is subsequently sold and relocated.³²⁷ Provisions in the new lease agreement between the two parties should contemplate equitable remedies as one way of enabling Erie County to seek action against the Bills in the event of a breach.³²⁸ The agreement should also contemplate substantial liquidated damages, or loan repayment obligations, from which the government can collect to cover the Erie County taxpayers' investment, should the Bills breach the lease agreement by relocating.³²⁹

The Buffalo Bills have a rich history in western New York, and in order to extend that history, Erie County, New York State and the Bills must arrive at a reasonable compromise.³³⁰ Erie County and New York State must recognize that there are plenty of financing options available to help pay the Bills.³³¹ In return, the Bills franchise must allow Erie County and its residents to protect their investment in the Bills and Ralph Wilson Stadium because in the

325. See *supra* notes 65-193 and accompanying text (describing financing options NFL teams have used for stadium construction).

326. See *supra* notes 194-249 and accompanying text (analyzing financing options as they relate to Buffalo Bills).

327. See *supra* notes 289-322 and accompanying text (analyzing contracting options Erie County should seek to protect taxpayer investment in stadium renovations).

328. See *generally supra* notes 289-322 and accompanying text (indicating that agreements between NFL franchises and hosting municipalities have stressed availability of equitable remedies under contract).

329. See *generally supra* notes 289-322 and accompanying text (indicating that agreements between NFL franchises and hosting municipalities have focused on agreeing to substantial liquidated damages or repayment obligations under contract).

330. See *Buffalo Bills History*, BUFFALO BILLS HISTORY, <http://www.history.buffalobills.com/Buffer+o+Bill+H+History> (last visited Jan. 10, 2013) (providing unique history of Buffalo Bills); see also *Buffalo Bills Community*, BUFFALO BILLS, <http://www.buffalobills.com/community/index.html> (last visited Jan. 10, 2013) (indicating Bills involvement in western New York community, including organized fitness, health and safety, military appreciation, and community support events).

331. See *supra* notes 194-249 and accompanying text (examining several financing options available to fund renovation of Ralph Wilson Stadium).

end, when it comes to giving Buffalo Bills fans something to celebrate, the Bills are due.³³²

VI. ADDENDUM

On December 21, 2012, the Buffalo Bills entered into a ten-year lease agreement with Erie County and New York State to lease Ralph Wilson Stadium to the Bills until 2023.³³³ The agreement provides for a total of \$130 million in stadium renovations, with Erie County contributing \$41 million, New York State contributing \$54 million, and the Bills contributing the remaining \$35 million.³³⁴ This marks the first time in the history of the parties' lease agreements that the Bills will make a team contribution toward the renovation of Ralph Wilson Stadium.³³⁵

The agreement also envisions the construction of a new stadium during the ten-year lease agreement.³³⁶ This may explain why the agreement provided for roughly half of the \$200 million the Bills organization originally sought in the summer and fall of 2012.³³⁷ Bills' CEO Russ Brandon acknowledged the possibility of a new stadium in Buffalo in the next decade during the same press conference in which he announced that the parties had reached an agreement.³³⁸ Additionally, the new lease agreement includes a provision allowing Erie County and New York State to take up to half of the funding that they are slated to pay for annual stadium

332. See Gee, *supra* note 10 (reporting that taxpayers need to be protected if Bills franchise were to relocate; observers of Bills lease negotiations expect figures of \$50 to \$100 million as liquidated damages fee).

333. See Tom Precious, *Bills Agree to Lease Deal with \$130 Million in Stadium Upgrades*, THE BUFFALO NEWS (Dec. 21, 2012), <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20121221/CITYANDREGION/121229867/1004> (reporting lease agreement between Buffalo Bills and Erie County and New York State on December 21, 2012).

334. See *id.* (reporting amount of contributions each party will make to finance stadium renovations).

335. See *id.* (noting Bills will make contribution toward renovations for first time under new lease agreement).

336. See Matt Krueger, *New Buffalo Bills Lease Makes Way for New Stadium*, THE CLARENCE BEE (Dec. 26, 2012), http://www.clarencebee.com/news/2012-12-26/Local_News/New_Buffalo_Bills_lease_makes_way_for_new_stadium.html (indicating provision in lease agreement to provide funding for new stadium in lieu of funding stadium renovations).

337. See Heaney, *supra* note 4 (estimating cost of renovations at \$200 million).

338. See *id.* (quoting Russ Brandon, CEO of Buffalo Bills, when he announced, "I think what's exciting about this is that we're going to look at the potential of a new stadium in the next decade or so and see if it makes sense for the community.").

renovations during the last three years of the lease and invest it into new stadium construction.³³⁹

The most noteworthy aspect of the agreement, however, is the liquidated damages provision.³⁴⁰ The provision provides that the Bills will pay \$400 million in damages if the team leaves Buffalo before 2023, with the exception that in year seven of the agreement, damages will be temporarily reduced to \$29 million.³⁴¹ After year seven, the damages provision increases to \$400 million for the final three years of the agreement.³⁴² This is substantially higher than the estimates provided by individuals close to the lease negotiations, who anticipated a liquidated damages provision in the range of \$50-\$100 million.³⁴³ Although some have advocated for the provision as a win for a team that is not accustomed to winning, others have expressed concern over the drastically lower damages provision in year seven.³⁴⁴

The agreement concentrated on the two most critical factors identified in this comment: (1) how financing for the stadium would be split amongst the parties, and (2) which provisions should

339. See Krueger, *supra* note 336 (reporting that “[i]n years eight, nine and [ten] of the deal, the state and county can take half of the money it pays for annual upgrades on Ralph Wilson Stadium and put it toward design and construction of a new facility”).

340. See generally Precious, *supra* note 333 (emphasizing liquidated damages provision in article).

341. See *id.* (reporting that “[t]he terms call for a \$400 million penalty if the team leaves Buffalo before 2023 with the exception that, after the seventh year, the team would pay only \$29 million. After that year, the penalty would go back to \$400 million.”).

342. See *id.* (identifying year seven of new lease agreement as critical because in year seven, liquidated damages are reduced to \$29 million and after year seven, liquidated damages increase to \$400 million for last three years of lease agreement).

343. See Gee, *supra* note 10 (reporting that observers of Bills lease negotiations expected figures of \$50 to \$100 million as liquidated damages fee).

344. See Terrence McCracken, *Lease a Win-Win for Buffalo Bills, Residents, and Community Growth*, CHEEKTOWAGA BEE (Jan. 10, 2013), http://www.cheektowagabee.com/news/2013-01-10/Editorials/Lease_a_winwin_for_Buffalo_Bills_residents_and_com.html (highlighting new lease agreement provisions as win for Bills franchise, win for residents of Buffalo, and win for community growth); see also Joe Buscaglia, *Bills Instill Both Hope and Fear with New Stadium Lease*, WGR 550 SPORTS RADIO, (Dec. 21, 2012), <http://wgr550.com/BUSCAGLIA-Bills-instill-both-hope-and-fear-with-ne/15098777> (explaining “the fact that an opt-out clause after the seventh year for a paltry (by NFL standards) \$28,363,500 was worked in, and that it was mentioned briefly at best during the press conference, it should be a tiny cause of concern to Bills fans looking for long-term security for their favorite football team.”).

be included to deter the Bills' franchise from relocating.³⁴⁵ While there is no doubt that this agreement helps the Bills' franchise remain viable in western New York in the short term, the problems it attempted to remedy will soon resurface for the Buffalo Bills, Erie County, and New York State.³⁴⁶ Namely, the Bills' ownership succession plan remains a mystery, and depending on when the team is sold, year seven of the agreement (the year in which the damages provision is reduced to \$29 million) will be critical in the contemplation of a possible relocation of the franchise.³⁴⁷

Additionally, the money allocated toward stadium renovations is only a temporary solution for one of the oldest stadiums in the league.³⁴⁸ In the same press conference that announced the extended stadium lease agreement, state, county, and team officials all acknowledged the possibility of building a new stadium during the lease term as a potential short term solution to keep Ralph Wilson Stadium operational until a better solution can be achieved.³⁴⁹ Moreover, the Bills continue to struggle to achieve a winning NFL record; in 2012 the Bills extended their playoff drought to thirteen straight seasons, finishing last in their division for the fifth year in a row.³⁵⁰ With these issues still in play and largely unaddressed by the recent lease agreement, it will not be long before the question of

345. See *supra* notes 8-10 and accompanying text (providing two major issues which prevented Bills and Erie County from reaching new lease agreement sooner).

346. For a further discussion of some of the problems left unaddressed under the new lease agreement, see *infra* notes 347-350 and accompanying text.

347. See Mike Harrington, *Bills Lease Deal Raises Fans' Spirits*, THE BUFFALO NEWS, Dec. 29, 2012, at A1, available at <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20121228/CITYANDREGION/121229340/1004> (reporting that "[t]here are plenty of nagging questions about the Bills' lease, especially since the team can get out of it after year seven for the relatively small sum of \$28.4 million. And even if it goes to completion, the Ralph will be nearly 50 years old and far past its prime as an NFL venue.").

348. For a further discussion of why the new lease agreement is only a temporary fix, see *infra* notes 349-351 and accompanying text.

349. See Krueger, *supra* note 336 (reporting "[s]tate, county, and team officials all commented on the possibility of a new stadium being constructed in Western New York during [the press conference on Dec. 21, 2012] to announce the new 10-year lease agreement").

350. See *Buffalo Bills' Win Over New York Jets Might Not Save Chan Gailey's Job*, NFL.COM, (Dec. 30, 2012), <http://www.nfl.com/news/story/0ap1000000119430/article/buffalo-bills-win-over-new-york-jets-might-not-save-chan-gaileys-job> (reporting that Bills "finished fourth in the AFC East for a fifth straight time while extending their postseason drought to 13 years").

“who is going to pay the Bills?” once again surfaces in western New York.³⁵¹

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351. *See supra* notes 347-350 and accompanying text (explaining issues that still need to be resolved concerning Bills franchise and Ralph Wilson Stadium).

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